No. 79-244

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is not yet reported. The district court entered no opinion pertaining to the question presented in this petition.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 11a) was entered on June 15, 1979. On July

9, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant whose constitutional rights were not violated by an illegal search may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search.

STATEMENT

1. On May 5, 1978, respondents were charged in a federal indictment with 12 counts of unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The indictment was based on 12 checks that had been stolen from the United States mails and that were seized by Massachusetts State Police officers on December 17, 1976, during their search, pursuant to a state warrant, of an apartment rented by the mother of respondent Zackular (App. A, *infra*, 1a-2a).[1] The indictment charged respondents with possession of

[1] The affidavit submitted in support of the application for a search warrant erroneously identified the premises as the apartment of Zackular's wife (App. A, *infra*, 4a n.1), and this error was repeated in the court of appeals' opinion (*id.* at 2a). It was established at a pretrial hearing, however, that the apartment was rented by Zackular's mother (C.A. App. 61, Tr. 45).

the stolen mail from November 7, 1975, through December 17, 1976, the date on which the search occurred (App. A, *infra*, 10a).

2. Respondents moved to suppress the checks and other evidence found during the search on the ground that the state officer's affidavit supporting the application for the search warrant was inadequate to show probable cause (C.A. App. 11-14). The district court granted those motions and ordered suppression.[2] The government sought reconsideration of the district court's ruling, contending that respondents lacked standing to challenge the legality of the search and seizure (C.A. App. 126). By handwritten fiat on the face of the government's motion, the district court reaffirmed its suppression order (C.A. App. 126a; App. A, *infra*, 2a).

3. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals affirmed (App. A, *infra*, 1a-10a). With respect to the issue of "standing,"[3] the court stated (*id.* at 8a-9a):

> We agree with the Government that neither [respondent] has actual standing to contest the law-

[2] The district court held the officer's affidavit to be deficient in relying on double hearsay and in failing to specify both the date on which the informant had engaged in a critical conversation with respondent Zackular and the date on which the informant had conveyed the information so obtained to the officer (C.A. App. 121-125).

[3] The court of appeals also affirmed the district court's determination that the affidavit in support of the search warrant was constitutionally inadequate (App. A, *infra*, 2a-8a). We do not present that issue for review.

> fulness of the search and seizures. Neither [respondent] has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks. [*Brown* v. *United States*, 411 U.S. 223, 229 (1973)].

Nevertheless, the court held that respondents had standing to challenge the search and seizure under the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). It noted that the Court in *Jones* had based the "automatic standing" rule on two considerations (App. A, *infra*, 9a):

> (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. [*Jones* v. *United States*] at 261-65; *Brown* v. *United States*, *supra* at 229.

After acknowledging that the first consideration had been eliminated by the decision in *Simmons* v. *United States*, 390 U.S. 377, 389-394 (1968), that a defendant's testimony in support of a suppression motion cannot be used against him at trial (App. A, *infra*, 9a), the court of appeals continued (*id.* at 9a-10a):

> The Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing. *See Rakas* v. *Illinois*, *supra* at 4027 n.4; *Brown* v. *United States*, *supra* at 228, 229. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. *Compare United States* v. *Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), and *United States* v. *Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975) (doctrine survives) *with United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve.

Finding that the indictment in this case charged as an essential element of the offense that respondents were in unlawful possession of the stolen mail on the date of the contested search and seizure, the court held that respondents had "automatic standing" under *Jones* and affirmed the district court's suppression order (*id.* at 10a).

REASONS FOR GRANTING THE PETITION

In *Jones* v. *United States*, 362 U.S. 257 (1960), the Court held that a defendant automatically has standing under the Fourth Amendment to move to

exclude from evidence an item that was seized during an assertedly illegal search where possession of the item by the defendant at the time of the search constitutes an essential element of the offense charged.[4]

However, this Court has recently noted that it has "not yet had occasion to decide whether the automatic standing rule of *Jones* survives [the] decision in *Simmons* v. *United States*, 390 U.S. 377 (1968)." *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 7 n.4.[5] The lack of guidance from the Court has resulted in a division of authority in the courts of appeals on the continued vitality of the *Jones* "automatic standing" rule. The instant case provides an appropriate opportunity for the Court to resolve this important and recurring issue.

1. As the Court has repeatedly emphasized, the Fourth Amendment protects individuals from unreasonable invasions of their legitimate expectations of privacy. *Rakas* v. *Illinois*, *supra*, slip op. 15; *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977). See also, *e.g.*, *United States* v. *Miller*, 425 U.S. 435, 440 (1976); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Katz* v. *United States*, 389 U.S. 347 (1967); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). "Fourth Amendment rights are personal

[4] The defendant in *Jones* was also held to have standing because of his legitimate expectation of privacy in the premises that were searched. See *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 15.

[5] The Court found it unnecessary to reach the question in *Brown* v. *United States*, 411 U.S. 223, 228-229 (1973). See also *Combs* v. *United States*, 408 U.S. 224 (1972).

rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, *supra*, slip op. 5, quoting *Alderman* v. *United States*, *supra*, 394 U.S. at 174.[6] Accordingly, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman*, *supra*, at 174." *Rakas* v. *Illinois*, *supra*, slip op. 5. The "automatic standing rule is inconsistent with these principles, for it "may allow a defendant to assert the Fourth Amendment rights of another." *Id.* at 7 n.4.

The doctrine of "automatic standing" was originally devised to serve the interrelated aims of (1) relieving a defendant from the dilemma in which, in order to assert his Fourth Amendment suppression claim, he would have to give testimony that the government could directly use against him at trial to prove his guilt, and (2) avoiding the "vice of prosecutorial self-contradiction" in the government's denying that the defendant had a possessory interest for

[6] The Court in *Rakas* abandoned the concept of "standing" under the Fourth Amendment, stating that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing" (slip op. 10-11). In this analysis the relevant inquiry is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect" (*id.* at 12).

purposes of the Fourth Amendment suppression claim while at the same time alleging defendant's possession as part of the offense charged. *Jones* v. *United States*, *supra*, 362 U.S. at 261, 263-264; *Brown* v. *United States*, *supra*, 411 U.S. at 229.[7] The first consideration was eliminated by this Court's subsequent holding in *Simmons* v. *United States*, *supra*, that a defendant's testimony on a motion to suppress cannot be used against him as part of the government's case at trial. As the Court recognized in *Brown* v. *United States*, *supra* (411 U.S. at 228), "The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution [in *Simmons*]."

The second basis for the *Jones* rule, the "vice of prosecutorial self-contradiction," does not justify including within the sweep of the exclusionary rule a defendant whose Fourth Amendment rights were not violated by the challenged search. The Court in *Jones* was concerned (362 U.S. at 263-264) that "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." See also *Brown* v. *United States*, *supra*, 411 U.S. at 229. But there is nothing either inconsistent or untoward in recognizing that the con-

[7] Thus, "automatic standing" was directed not to the privacy interests embodied in the Fourth Amendment but rather to a problem of self-incrimination and the perceived impropriety of the government's position in criminal cases.

cept of "possession" can have different meanings in different contexts. In particular, it does not disserve our system of laws to require that a defendant who seeks to invoke the Fourth Amendment and the exclusionary rule must demonstrate a personal interest reflecting a legitimate expectation of privacy, while at the same time prosecuting for violations of the criminal code those who had constructive but not actual possession of the items seized at the time of the search.[8] Moreover, whatever its logical force, this rationale by itself should not suffice to impose upon society the heavy costs of allowing defendants to obtain suppression of probative evidence even though their Fourth Amendment rights were not infringed.

2. There is clear disagreement among the circuits on the continued applicability of the "automatic standing" rule. The Sixth Circuit has abandoned the rule in light of *Simmons* v. *United States*. See *United States* v. *Grunsfeld*, 558 F.2d 1231, 1241-1242 (6th Cir. 1977), cert. denied, 434 U.S. 872, 1016 (1978); *United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. (1976); *United States* v. *Dye*, 508 F.2d 1226, 1232-1234 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975). The Tenth Circuit has suggested that it reads *Simmons* and *Brown* to repudiate the "automatic standing" rule. See *United States* v. *Smith*, 495 F.2d 668, 670 (10th Cir. 1974). The Fifth Cir-

[8] The "automatic standing" rule also suffers from treating a possessory interest in the items *seized* as sufficient to permit a Fourth Amendment challenge to the underlying *search*. See, *e.g.*, *United States* v. *Lisk*, 522 F.2d 228 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976).

cuit has expressed "serious doubts concerning the viability of the 'automatic standing' rule in light of *Simmons* v. *United States*" (*United States* v. *Edwards*, 577 F.2d 883, 892 (5th Cir. 1978) (en banc)),[9] but nonetheless has continued to apply the rule. See, *e.g.*, *United States* v. *Ullrich*, 580 F.2d 765, 768 (5th Cir. 1978). The Second Circuit, while expressing "misgivings about the continued survival of the concept of automatic standing" (*United States* v. *Oates*, 560 F.2d 45, 52 (2d Cir. 1977)), has stated "that overruling *Jones* is properly a matter for the Supreme Court." *United States* v. *Galante*, 547 F.2d 733, 737 (2d Cir. 1976); see also *United States* v. *Ochs*, 595 F.2d 1247, 1253 n.4 (2d Cir. 1979); *United States* v. *Riquelmy*, 572 F.2d 947, 950-951 (2d Cir. 1978); *United States* v. *Oates*, *supra*. The Eighth Circuit has also declared that it will adhere to the "automatic standing" rule in the absence of a clear mandate from this Court (see *United States* v. *Anderson*, 552 F.2d 1296, 1299 (8th Cir. 1977)), while the Seventh and Ninth Circuits have indicated that they still recognize the doctrine of "automatic standing." See *United States* v. *Alewelt*, 532 F.2d 1165, 1167 (7th Cir. 1976); *United States* v. *Powell*, 587 F.2d 443, 446 (9th Cir. 1978). And in the instant case the First Circuit held (App. A, *infra*, 9a) that despite *Simmons*, *Brown* and *Rakas*, it would abide by the rule until the Court passes on the issue.

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[9] Five judges in *Edwards* concluded that the "automatic standing" rule should be eliminated (577 F.2d at 896). See also *United States* v. *Cotham*, 363 F. Supp. 851 (W.D. Tex. 1973).

Such a division of authority on a recurring and important question clearly calls for review by this Court.

3. The instant case offers the Court the occasion to resolve the "automatic standing" issue. The indictment charges respondents with unlawful possession of stolen mail on the date of the search as an essential element of the offense alleged. Moreover, the court of appeals explicitly and correctly held (App. A, *infra*, 8a-9a) that respondents, who had no proprietary or possessory interest in the apartment that was searched and were not present at the time of the search, have no "actual standing." Thus, the "automatic standing" rule is applicable under *Jones* and provides the only basis for respondents to contest the legality of the search and seizure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 78-1529

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN M. SALVUCCI, JR., JOSEPH G. ZACKULAR,
DEFENDANTS, APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. W. ARTHUR GARRITY, *U.S. District Judge*]

Before ALDRICH AND CAMPBELL, *Circuit Judges*,
and GIGNOUX, *District Judge**

June 15, 1979

GIGNOUX, *District Judge*. On May 15, 1978, defendants-appellees, John M. Salvucci, Jr. and Joseph

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* Of the District of Maine, sitting by designation.

G. Zackular, were indicted by a federal grand jury and charged in 12 counts with unlawful possession of checks stolen from the mail, a violation of 18 U.S.C. § 1708. The checks involved had been seized from an apartment rented by Zackular's wife at 93 Pleasant Street, Melrose, Massachusetts. The seizure was made by officers of the Massachusetts State Police acting pursuant to a search warrant issued by the Malden District Court.

Defendants filed a motion to suppress the seized checks as evidence against them at trial. This motion was granted by the district court, after hearing, on the ground that the affidavit supporting the search warrant failed to establish the requisite probable cause for the issuance of the warrant. Thereafter, the United States filed a motion for reconsideration, arguing that defendants lacked standing to contest the search and seizures. After considering memoranda submitted by counsel, the district court reaffirmed its suppression order.

The Government's appeal from these adverse rulings presents two issues: (1) whether the affidavit supporting the search warrant established probable cause for issuance of the warrant; and (2) whether defendants have standing to contest the search and seizures. As we conclude that the district court properly suppressed the checks, we affirm its order.

I

We address first the question of whether the supporting affidavit established probable cause for the

issuance of the warrant. The warrant, authorizing the search of the premises located at 93 Pleasant Street, Apartment 93E, Melrose, Massachusetts, was issued by a clerk of the Malden District Court solely upon the basis of the affidavit of Massachusetts State Police Trooper Ronald J. Bellanti. The objects authorized to be seized were a checkwriting machine, other articles used to make forged checks, and forged checks. Bellanti's affidavit, the relevant portions of which are fully set out in the margin,[1] recited the

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[1] The affidavit presented to the state court clerk reads, in relevant part, as follows:

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

As a result of information received from a reliable [*sic*] informant, who has provided me with reliable information in the past, to wit:

On October 24, 1976 this informant told this officer that on October 22, 1976 four round trip open-end coach tickets were purchased at the TWA ticket counter at Logan Airport in East Boston for passage from Boston to Las Vega, Nevada, and Las Vegas to Boston, with a forged bank check which carried the name of Marblehead Savings Bank for the sum of $1,552.00, and that this purchase was made by a Kathleen Burke, who was arrested for a like offense on October 23, 1976 by this officer. . . . As a result of the information furnished to this officer by the informant, and an investigation that was conducted, subject Kathleen Burke, on November 9, 1976 was served with a warrant at the East Boston District Court and charged with two complaints . . . . This informant also gave this officer information regarding a Joseph G. Zackular of 247 Washington St., Winthrop, Mass. This information was in reference to a conversation, in which subject Zackular had made statements

following material facts. On October 24, 1976, Bellanti had received information from a reliable informant that on October 22, 1976, one Kathleen Burke had purchased four airline tickets with a forged bank check. The same informant also gave

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regarding his possession of certain articles that he had in his apartement at 247 Washington St., Winthrop which were used to manufacture counterfeit licenses, and to manufacture forged checks. And that these articles were the ones used to make the license that subject Burke had used for identification when she passed the above mentioned forged checks. This information furnished by the informant and an investigation conducted by this officer led to a successful raid on subject Zackular's house in Winthrop and his arrest. . . . This informant who has proven its reliability in the past by giving to this officer the aforementioned reliable information has given this officer the following information. That prior to this date it was present during a conversation in which Joseph G. Zackular had stated he had a check writer which was being kept at his wife's apartment in Melrose. And that subject Zackular had stated this check writer is the one that had been being used to print amounts of money payable on forged checks. The informant also told this officer that the person that subject Zackular had referred as his wife, to best of the informants [*sic*] knowledge is either his present or past wife. The informant also stated that this subjects [*sic*] name was Jean D. Zackular and that he knew the location of her apartment. On December 14, 1976 this officer with the informant went to the Town Estates in Melrose, and the informant pointed out several windows belonging to the apartment occupied by Jean D. Zackular. . . . On December 15, 1976 this officer went to the Town Estates Apartment Complex and after investigation, it was learned that subject Jean D. Zackular occupies apartment #93E located on third floor of 93 Pleasant St., and that this apartment was leased to subject Jean D. Zackular on May 15, 1975, and that the lease is self-extending.

Bellanti information regarding defendant Zackular. This information concerned a conversation in which Zackular made statements regarding his possession of certain articles located in his apartment at 247 Washington Street, Winthrop, Massachusetts, which were used to manufacture counterfeit licenses and forged checks, including the counterfeit license used by Kathleen Burke for identification when she purchased the above-mentioned airline tickets. This information led to a successful raid of Zackular's apartment and his arrest.

Bellanti's affidavit further set forth that the informant "who has proven its reliability in the past by giving to this officer the aforementioned reliable information" has furnished the following information: "That prior to this date it [the informant] was present during a conversation in which Joseph G. Zackular had stated he had a check writer which was being kept at his wife's apartment in Melrose," and that this checkwriter was the one that had been used to print amounts of money payable on forged checks. The informant also told Bellanti that the person Zackular had referred to as his wife was either his present or past wife, and her name was Jean D. Zackular. Finally, the affidavit recites that on December 14, 1976, Bellanti, with the informant, went to the Town Estates in Melrose, where the informant pointed out several windows belonging to the apartment occupied by Jean D. Zackular. On December 15, 1976, Bellanti returned to the apartment complex and learned that Apartment 93E was leased by Jean D. Zackular.

The warrant was issued on December 15, 1976, and the search was conducted on December 17. During the search, a checkwriting machine and a large number of stolen checks were seized.

We agree with the court below that Bellanti's affidavit was insufficient to establish probable cause to issue a search warrant. At the outset, we are aware that we must interpret the affidavit "in a commonsense and realistic fashion," not with "[a] grudging or negative attitude" or in a "hypertechnical" manner. *United States* v. *Ventresca*, 380 U.S. 102, 108-09 (1965). Nevertheless, the Fourth Amendment requires that the supporting affidavit set forth facts sufficient to allow a neutral magistrate to reasonably conclude that the property sought is located on the premises to be searched at the time the warrant issues. *Rosencranz* v. *United States*, 356 F.2d 310, 314-18 (1st Cir. 1966). A reviewing court may consider only that information which is contained within the four corners of the supporting affidavit. *Aguilar* v. *Texas*, 378 U.S. 108-109 n.1 (1964); *Rosencranz* v. *United States*, *supra* at 314. The fatal defect in the present affidavit is that it does not disclose the date of the conversation overheard by the informant in which Zackular stated that the checkwriter used to print forged checks was being kept at his wife's apartment in Melrose. Without this date, there was no way for the magistrate to determine whether the information was sufficiently timely to support the warrant. The absence of any reasonably specific averment as to the time of this conversation is fatal

to the warrant. *Rosencranz* v. *United States*, *supra* at 315-18.

We recognize that where "undated information is factually interrelated with other, dated information in the affidavit, then the inference that the events took place in close proximity to the dates actually given may be permissible." *United States* v. *Holliday*, 474 F.2d 320, 322 (10th Cir. 1973). Relying on this rule, the Government contends that a reading of the entire affidavit permits an inference that both Bellanti's undated conversation with the informant and the conversation with Zackular overheard by the informant took place between October 24 and December 15, 1976.[2] While we might agree that one can reasonably infer from the present affidavit that Bellanti's conversation with the informant took place after October 24, 1976, there is nothing in the affidavit that suggests when the informant obtained the relevant information from Zackular. The affidavit simply states that "*prior to this date* [the date of the warrant application] it [the informant] was

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[2] As we reject the invited inference as to its date, we need not reach the question whether the information received by the informant in the conversation with Zackular would be sufficiently timely, under the Government's theory, to support a finding of probable cause at the time the warrant issued. *See Andresen* v. *Maryland*, 427 U.S. 463, 478-79 n.9 (1976); *United States* v. *Brinklow*, 560 F.2d 1003, 1005-06 (10th Cir. 1977); *cert. denied*, 434 U.S. 1047 (1978); *United States* v. *DiMuro*, 540 F.2d 503, 515-16 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975); *Rosencranz* v. *United States*, *supra* at 316 n.3 and cases there cited.

present during a conversation in which Joseph G. Zackular had stated that he had a checkwriter which was being kept at his wife's apartment in Melrose." (emphasis added). It is impossible to know from the affidavit if the conversation occurred days, months, or years prior to the application for the warrant. As stated by this Court in *Rosencranz* v. *United States*, *supra* at 318, "undated, conclusory information from an anonymous source . . . with no other reasonably specific clues to the time" is inadequate to justify a finding of probable cause.

II

We now turn to the issue of defendants' standing to challenge the lawfulness of the search of the Melrose apartment and the seizures of the checks found therein. Although the district court did not articulate its reasons for rejecting the Government's contentions, we agree that defendants have standing.

As a general rule, Fourth Amendment rights may not be vicariously asserted. *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). To contest a search and seizure on Fourth Amendment grounds, a defendant must have either "actual standing" or "automatic standing." To have actual standing, a defendant must establish a legitimate and reasonable expectation of privacy in the premises searched or the property seized. *Rakas* v. *Illinois*, 47 U.S.L.W. 4025 (U.S. Dec. 5, 1978); *see Brown* v. *United States*, 411 U.S. 223, 229 (1973). We agree with the Government that neither defendant has actual standing

to contest the lawfulness of the search and seizures. Neither defendants has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks. *Id.*

Both defendants, however, have automatic standing to object to the search and seizures under *Jones* v. *United States*, 362 U.S. 257 (1960). In *Jones*, the Supreme Court held that a defendant has automatic standing to challenge the legality of a search or seizure if charged with a crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. The Court offered a twofold rationale in support of this rule: (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. *Id.* at 261-65; *Brown* v. *United States*, *supra* at 229.

The first part of this twofold rationale was essentially eliminated by the Supreme Court's holding in *Simmons* v. *United States*, 390 U.S. 377, 389-94 (1968), that a defendant's testimony in support of a motion to suppress may not be used against him at trial. The Supreme Court itself has questioned, but

unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing. *See Rakas* v. *Illinois*, *supra* at 4027 n.4; *Brown* v. *United States*, *supra* at 228, 229. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. *Compare United States* v. *Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), *and United States* v. *Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975) (doctrine survives) *with United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve.

In the present case, the indictment charges that the defendants knowingly and unlawfully possessed checks stolen from the mails "between on or about November 7, 1975 to on or about December 17, 1976," the latter date being that on which the contested search and seizures occurred. They are charged with a crime that includes as an essential element possession of the evidence seized at the time of the contested search and seizures. They, therefore, have automatic standing to object.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1529

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN M. SALVUCCI, JR., ET AL.,
DEFENDANTS, APPELLEES

JUDGMENT

Entered June 15, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana M. Gallup
Clerk.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 298545 48

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JOHN M. SALVUCCI, JR., and JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 14, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JOHN M. SALVUCCI, JR., and JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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* A copy of the judgment and opinion of the United States Court of Appeals for the First Circuit was reproduced as Appendix A to the petition for a writ of certiorari (pp. 1a-11a).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. 78-191-G

UNITED STATES OF AMERICA

v.

JOHN M. SALVUCCI and JOSEPH ZACKULAR

DOCKET ENTRIES

DATE	PROCEEDINGS
5/5/78	Indictment returned. Case referred to Magistrate *COHEN* for pretrial proceedings.
5/12/78	*COHEN, M.* Arr. notes: Defendants enter pleas of Not Guilty; motions due 5/22/78; present bail cont'd.
5/15/78	Deft. Salvucci's motions: for bill of particulars; for list of witnesses; to be furnished w/crim. records; for information as to Govt's use of informants; for notice of use of prior acts; for prior statements of witnesses; for Grand Jury minutes; to suppress; to dismiss; to compel Govt. to state reasons; for hearing, filed, c/s
5/18/78	Deft. Zackular's motions: to suppress and to dismiss, filed, c/s
5/23/78	Govt's response to defendants' pre-trial motions, filed c/s
5/30/78	Memo to Clerk from AUSA Laymon re Omnibus Hearing, filed
6/5/78	*COHEN, M.*—Memorandum and order of pre-trial motions, filed.

DATE	PROCEEDINGS

6/12/78 Deft. Zackular's motion for review of Order of Magistrate, filed, c/s

6/12/78 Government's response to Ds' motion for bill of particulars, filed; Government's response to Ds' motion for review, filed; supplemental response to Ds' motion for review, filed (c/s).

7/7/78 *GARRITY, J.*—Called; motions hearing scheduled for 8/7/78 at 2:00 PM and trial scheduled for 9/5/78 at 10 AM.

8/4/78 Government's memorandum of law, filed (c/s).

8/7/78 *GARRITY, J.*—After hearing, Ds' motion for names of government witnesses, DENIED; Ds' motion to suppress evidence illegally seized and Ds' motion to dismiss: "parties given until 8/11 to file supplementary briefs, and taken under advisement as to motion to suppress" and motion to dismiss is DENIED.

8/14/78 Government's memo of law in opposition to Ds' motion to suppress, filed. (c/s)

8/18/78 *GARRITY, J.*—Memorandum and order suppressing evidence, ENTERED (cc/cl on 8/22).

9/7/78 Govt's motion for reconsideration of Court's order suppressing evidence, filed, c/s.

9/8/78 *GARRITY, J.* re: Motion for reconsideration of district court order suppressing evidence, PROCEDURAL ORDER: The court will give further consideration to the standing issue. Defendants shall file memoranda of law on that issue on or before 9/19/78. (cc/cl)

9/18/78 Defendant Zackular's supplemental memo of law, filed, c/s

9/19/78 Deft. Salvucci's memorandum on question of standing, filed, c/s

9/28/78 Govt's memo in supp. of Motion to Reconsider District Court Order Suppressing Evidence, filed, c/s.

DATE	PROCEEDINGS

9/29/78 *GARRITY, J.*—Upon re-consideration in light of the parties memoranda, order of suppression entered 8/18/78 is re-affirmed. (cc/cl)

10/27/78 Govt's notice of appeal of GARRITY, J. 9/29/78 order, filed, c/s.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Indictment No. 78-191-G

[Filed May 5, 1978]

UNITED STATES OF AMERICA

v.

JOHN M. SALVUCCI and JOSEPH ZACKULAR

The grand jury charges:

COUNT I

Between on or about November 7, 1975 to on or about December 17, 1976 at and about Melrose, in the District of Massachusetts

JOSEPH ZACKULAR

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Grace Realty check No. 762, payable to New England Telephone, in the amount of $108.28, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT II

Between on or about November 8, 1975 to on or about December 17, 1976 at and about Melrose, and/or Roxbury, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Lolly's Bakery check No. 4613, payable to Siegel Egg, in the amount of $1,396.75,

which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT III

Between on or about December 16, 1975 to on or about December 17, 1976 at and about Melrose, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Star Litho, Inc. check No. 11275, payable to Blue Cross/Blue Shield, in the amount of $44.49, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT IV

Between on about December 24, 1975 to on or about December 17, 1976 at and about Melrose, and/or Dorchester, in the District of Massachusetts

JOHN M. SALVUCCI

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Afco Metals, Inc. check No. 5191, payable to U. N. Alloy Steel, in the amount of $17.78, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT V

Between on or about April 26, 1976 to on or about December 17, 1976 at and about Melrose, and/or South Boston, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Austin Service & Sales Co. check No. 4199, payable to Colmar Belting Co., in the amount of $14.10, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT VI

Between on or about June 17, 1976 to on or about December 17, 1976 at and about Melrose, and/or Winthrop, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Attorney Leon Aborn check No. 7443, payable to Winthrop Community Hospital, in the amount of $12.00, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT VII

Between on or about June 17, 1976 to on or about December 17, 1976 at and about Melrose, and/or Boston, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Daka check No. 130786, payable to M. Otis, in the amount of $159.39, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT VIII

Between on or about June 17, 1976 to on or about December 17, 1976 at and about Melrose, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Attorney Leon Aborn check No. 7441, payable to Charles Libermore, M.D., in the amount of $95.00, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT IX

Between on or about June 17, 1976 to on or about December 17, 1976 at and about Melrose, in the District of Massachusetts

JOHN M. SALVUCCI

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a Kimball Foods, Inc. check No. 1024, payable to Star Kist Foods, Inc., in the amount of $3,312.25, which check had been contained in an item of mail which item of mail had been placed in the U.S.

Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT X

Between on or about June 29, 1976 to on or about December 17, 1976 at and about Melrose, and/or Malden, in the District of Massachusetts

JOHN M. SALVUCCI

and

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in their possession a check, to wit, a Melrose Savings Bank check No. 4978, payable to Fort Hill Engraving Co., in the amount of $12.25, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and they did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT XI

Between on or about July 12, 1976 to on or about December 17, 1976 at and about Melrose, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a M. Cutler & Sons check No. 1311, payable to S. B. A., in the amount of $402.00, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

COUNT XII

Between on or about July 12, 1976 to on or about December 17, 1976 at and about Melrose, in the District of Massachusetts

JOSEPH ZAKULAR [sic]

did willfully, knowingly, and unlawfully have in his possession a check, to wit, a M. Cutler & Sons check No. 1312, payable to N. J. Division of Motor Vehicles, in the amount of $16.00, which check had been contained in an item of mail which item of mail had been placed in the U.S. Mails, which item of mail had been stolen from the U.S. Mails, and he did so with the knowledge that the item of mail had been stolen; all in violation of 18 U.S. Code, § 1708.

.wlo

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Commonwealth of Massachusetts

Middlesex, ss. Malden District Court
Court

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT*

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended

December 15, 19 76

I, Ronald J. Bellanti, being duly sworn, depose and say:
Name of applicant

1. I am State Police Officer assigned to Logan Airport East Boston Mass.
(Describe position, assignment, office, etc.)

2. I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (If space is insufficient, attach affidavit or affidavits hereto) As a result of information received from a reliable informant, who has provided me with reliable information in the past, to wit: On October 24, 1976 this informant told this officer that on October 22, 1976 four round trip open-end coach tickets were purchased at the TWA ticket counter at Logan Airport in East Boston for passage from Boston to Las Vegas Nevada, and Las Vegas to Boston, with a forged bank check which carried the name of Marblehead Savings Bank for the sum of $1,552.00, and that this purchase was made by a Kathleen Burke, who was arrested for a like offense on October 23, 1976 by this officer. At the time of this arrest it was learned that subject Burke had used a counterfeit Massachusetts Drivers License and a phony Aetna Insurance Co identification card as identification. An investigation into the above information given by the informant revealed the following information. The information was true, and that the keeper of the records at TWA did produce a check with the Marblehead Savings Bank, Marblehead Mass., name on it. The check bore the number 1765 and was used to purchase ticket numbers 015 220 365984 - 015 220 365986 - 015 220 365987 -

*3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described ~~— and —~~ or is being concealed, etc.

and may be found in the possession of Joseph G. Zackular or Jean D. Zackular
Name of person or persons

at premises 93 Pleasant St., Melrose Mass, Apt. # 93E
(Identify number, street, place, etc.)

4. The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible). A check writing machine, used to print amounts of money on checks which were used by Kathleen Burke, which were forged checks, and which bore the name Marblehead Savings Bank, and other related articles used to make (manufacture) and write out forged checks. And any forged checks bearing the name, Marblehead Savings Bank. And any other forged or counterfeit checks.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the person or persons to be searched) Apartment # 93E at 93 Pleasant St., Melrose Mass., and the numbered (#93E) article assigned to subject Zackular, and the persons of Joseph G. Zackular and Jean D. Zackular. This building is a brick structure, is three story building, with the first floor consisting of basement apartments. Apartment #93E is located on the third floor and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

Ronald J Bellanti
Signature of Applicant

Then personally appeared the above named Ronald J. Bellanti and made oath that the foregoing affidavit by him subscribed is true.

Before me this 15th day of December 19 76

Michael V. Abood

Commonwealth of Massachusetts

Middlesex, ss. Malden District Court
County Court

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT*

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended

December 15, 19 76

I, Ronald J. Bellanti, being duly sworn, depose and say:
Name of applicant

1. I am State Police Officer assigned to Logan Airport East Boston Mass.
(Describe position, assignment, office, etc.)

2. I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (If space is insufficient, attach affidavit or affidavits hereto) As a result of information received from a relaible nformant, who has provided me with reliable information in the past, to wit: On October 24; 976 this informant tol this officer that on October 22, 1976 four round trip open-end coach ickets were purchased at the TWA ticket counter at Logan Airport in East Boston for passage om Boston to Las Vegas Nevada, and Las Vegas to Boston, with a forged bank check which car- ed the name of Marblehead Savings Bank for the sum of $1,552.00, and that this purchase was de by a Kathleen Burke, who was arrested for a like offense on October 23, 1976 by this of- cer. At the time of this arrest it was learned that subject Burke had used a counterfeit assachusetts Drivers License and a phony Aetna Insurance Co identification card as identificatio investigation into the above information given by the informant revealed the following infor- tion. The information was true, and that the keeper of the records at TWA did produce a check th the Marblehead Savings Bank, Marblehead Mass., name on it. The check bore the number 19493 d was used to purchase ticket numbers 0154301365984 - 0154301365986 - 0154301365987 -

*3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described —~~have been stolen~~ — or is being concealed, etc.
and may be found in the possession of Joseph G. Zackular or Jean D. Zackular
Name of person or persons
at premises 23 Pleasant St., Melrose Mass, Apt. # 23E
(Identify number, street, place, etc.)

4. The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible). A check writing machine, used to print amounts of ey on checks which were used by Kathleen Burke, which were forged checks, and which bore name Marblehead Savings Bank, and other related articles used to make (manufacture) and te out forged checks. And any forged checks bearing the name, Marblehead Savings Bank. And other forged or counterfeit checks.

his building, the storage area is located on the basement floor of the building, in a room h contains other storage cubicles which are numbered, and assigned to the persons occupying co-responding numbered apartments.

RJB 12/16/76

... and further relief that the court may deem proper.

Ronald J. Bellanti
Signature of Applicant

a personally appeared the above named Ronald J. Bellanti
made oath that the foregoing affidavit by him subscribed is true.

Before me this 15th day of December 19 76

Michael V. Sheard

5420486598S. This check proved to be worthless and forged. This check also contained
ıe same check number /194934/ as the check used by subject Burke on October 23, 1976(Of-
ınse she was arrested for) and is identical in appearance except for the amount it was made
ıt for,($4, 130.00) As a result of the information furnished to this officer by the infor-
ınt, and an investigation that was conducted, subject Kathleen Burke, on November 9, 1976
.ı ırved with a warrant at the East Boston District Court and charged with two complaints
ıc.. of: Attempted Larceny of Plane Rides - Uttering a Forged Instrument - Possession of
ounterfeit Licenses. This informant also gave this officer information regarding a Joseph
. Zackular of 247 Washington St., Winthrop Mass. This information was in reference to a
ınversation, in which subject Zackular had made statements regarding his possession of cer-
ıin articles that he had in his apartment at 247 Washington St, Winthrop which were used to
ınufacture counterfeit licenses, and to manufacture forged checks. And that these articles
ere the ones used to make the license that subject Burke had used for identification when she
ıssed the above mentioned forged checks. This information furnished by the informant and an
ınvestigation conducted by this officer led to a successful raid on subject Zackular's house
ı Winthrop and his arrest. Some of the items seized as a result of this raid included: A
olen Polaroid Land Identification System Camera, which was used to manufacture counterfeit
ıssachusetts Drivers Licenses, several counterfeit licenses, a piece of stolen Registry of
otor Vehicles Laminate, two unregistered firearms, and approximately 2.2 lbs of Marijuana.
ıis informant who has proven its reliability in the past by giving to this officer the afore-
ntioned reliable information has given this officer the following information. That prior
o this date it was present during a conversation in which Joseph G. Zackular had stated he
ıd a check writer which was being kept at his wife's apartment in Melrose.) And that subject
ıckular had stated this check writer is the one that had been being used to print amounts of
oney papable on forged checks. (The informant also told this officer that the person that sub-
ect Zackular had referred as his wife, to best of the informants knowledge is either his pre-
ent or past wife. The informant also stated that this subjects name was Jean D. Zackular and
ıat he knew the location of her apartment. On December 14, 1976 this officer with the infor-
ınt went to the Town Estates in Melrose, and the informant pointed out several windows belong-
ıg to the apartment occupied by Jean D. Zackular. These windows were located on the third
loor of 93 Pleasant St., Melrose Mass., and were on the side and front of the building.(Front
ilding denoted by this officer as side of building in which outside door with the number
3 is located) On December 15, 1976 this officer went to the Town Estates Apartment Complex
ıd after investigation, it was learned that subject Jean D. Zackular Occupies apartment # 93E
ocated on third floor of 93 Pleasant St, and that this apartment was leased to subject Jean D.
ıckular on May 15, 1975, and that the lease is self-extending. RJB 12/15/76

Commonwealth of Massachusetts

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Middlesex ....., ss. ..... First District Court of Eastern Middlesex .....

(Search Warrant)

TO THE SHERIFFS OF OUR SEVERAL COUNTIES, OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR SAID COMMONWEALTH:

Proof by affidavit having been made this day before .....Michael P. Storry.....

xx .....

that there is probable cause for believing that [illegible] certain property is intended for use or has been used as the means of committing a crime [illegible]

WE THEREFORE COMMAND YOU in the daytime (or at any time of the day or night) to make an immediate search of [illegible] third floor of the multiple dwelling apartment house numbered 93 Pleasant Street, Melrose, said apartment being numbered 93E; and the cubicle assigned to said Jean D. Zackular, said cubicle being located in the basement of said 93 Pleasant Street, Melrose, and bearing the number 93E

[illegible] and of the person of

.....Jean D. Zackular....., and of any person present who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for the following property:

A check writing machine, used to print amounts of money on checks which were used by Kathleen Burke, which were forged checks, and which bore the name Marblehead Savings Bank, and other related articles used to make (manufacture) and write out forged checks, and any forged checks bearing the name Marblehead Savings Bank, and any other forged or counterfiet checks

and if you find any such property or any part thereof to bring it and the persons in whose possession it is found before the First District Court of Eastern Middlesex

at Malden

in said County and Commonwealth, as soon as it has been served and in any event not later than seven days of issuance thereof

Witness, Louis H. Glaser, Esquire, Justice, at Malden, First District Court of Eastern Middlesex, aforesaid, this ..15th..... day of ..December..... in the year of our Lord one thousand nine hundred and .....seventy-six..... .

Richard P. Storry

Clerk of First District Court of Eastern Middlesex

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557

19 76 No. ..6052..

First District Court of Eastern Middlesex
Court

COMMONWEALTH

VS.

....Articles used in Committing a Crime

SEARCH WARRANT AND RETURN
G.L. c. 276, ss. 1 to 7
(St. 1964, c. 557)

RETURN OF OFFICER SERVING SEARCH WARRANT

I recieved this search warrant ...December 15, 19..76.., and have executed it as follows:

On ...December 17, 19..76.. at 6:30 o'clock ...A..M., I searched the premises described in the warrant—also ..---------..., named in the warrant, and ..---------....

The following is an inventory of the property taken pursuant to the warrant:

1 Paymaster Checkwriter, Ser # is 10136
1 Card-board box containing: 619 stolen personal & commercial checks with various names and company names on same. - A building & land deed & correspondence belonging to Vilas & Aline Likhite. - A stock certificate from Acushnet Co. to Mrs Dorothy Ackeneay.- One piece (fragment) of Registry of MV's Laminate.
1 Paper bag containing: 105 stolen personal & commercial checks with various names and company names on same,- six Policy books belonging to Catherine (Swan) Chilante from John Hancock Ins Co. one house deed & correspondence belonging to: Elsie E McCowan.- one bank book (Payment) belonging to Domenic Ciambelli. -Several bank statements to various people. (Above checks-deeds-statements stolen from US Mail)
1 White envelope containing: 3k stolen & forged checks. - one piece (fragment) of Registry of MV'S laminate.
1 White envelope containing: 6 stolen Registry of MV's data cards, Form # 220, 1 of which bears the counterfeit signature of Registrar of MV's Robert A. Panora 1 of which bears the counterfeit signature of Deputy Registrar of MV's E. Theodore Gunaris-Parts of a driver. license folder. (Con't)

This inventory was made in the presence of ...Lieutenant Detective...
and ...Lieutenant Detective....

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

...Lieutenant Detective...

Subscribed and sworn to before me this ...20th...day of ...December..., 19..76...

...Catherine Ahern...
~~Notary Public~~
~~Clerk~~
Asst. Assistant Clerk

This page is a continuation of items seized on Warrant # 6052. RJB 12/20/76

A piece of stolen Registry of MV's Laminate. - one stolen airline ticket, Trans-World-Airlines Ticket # 0154204865984. - 21 Forged Essex Bank checks # 416144. - 26 Forged Marblehead Savings Bank checks # 194943. - 13 Forged Marblehead Savings Bank checks, # 194934. - 5 blank sheets of yellow check paper. - 3 small sheets of lamination (clear plastic). one phony Aetna Insurance Co. ID bearing name of Kathleen M. Murphy.

1 White envelope (found in aforementioned card board box) containing: a birth certificate, a Selective Service Classification Card, a Selective Service Registration card, and a Commonwealth of Mass. pistol permit bearing the name of James F.DiPlatzi(pistol permit) and Charles E. Shay (Other ID)
Various other papers including excise tax bills - bank statements - & cancelled checks.

1 Simex Mariner Sextant, Ser # 3685, with wooden carrying case.

Also taken in aforementioned cardboard box and paper bag: numerous ~~envelopes~~ envelopes both post marked and not post marked bearing numerous various names and addresses

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKETED

Criminal No. 78-191-G

UNITED STATES OF AMERICA

v.

JOHN SALVUCCI
JOSEPH ZACKULAR

MEMORANDUM AND ORDER SUPPRESSING EVIDENCE

August 18, 1978

GARRITY, J. After hearing defendants' motions to suppress evidence seized by the Massachusetts State Police on December 17, 1976 and considering supporting and opposing memoranda of law, it is ordered that the motions be allowed and the evidence suppressed.

In so ruling we are mindful of the common sense approach which must be taken in construing affidavits in support of applications for search warrants, see *United States* v. *Ventresca*, 1965, 380 U.S. 102, 108-109, and of the rule "that doubtful cases should be resolved in favor of the warrant", *Rosencranz* v. *United States*, 1 Cir. 1966, 356 F.2d 310, 316. We have applied the tests described in the *Rosencranz* opinion and conclude that the officer's affidavit dated December 15, 1976 failed to show probable cause to believe that the property sought was at the time of the application located in the apartment searched and that therefore the search was unreasonable, in violation of the fourth amendment.

The difficulty with the officer's application is that it combines a failure to specify times of critical conversations with double hearsay. If only one of these circumstances existed, the result might be different. The basis

for the application to the Clerk of the Malden District Court was that a reliable informant had told the officer that a subject of investigation had said in his presence that the property in question was being kept at his wife's apartment. No time was specified either as to the officer's conversation with the informant or the informant's conversation with the subject of investigation. In some respects the application was even weaker than the one in the *Rosencranz* case. There the officer's affidavit at least used the present tense; here the past tense was used ("Zackular had stated he had a checkwriter which was being kept at his wife's apartment in Melrose"). There the application was based in part on the officer's personal observations, i.e., smelling a strong order of mash; here the sole basis for believing that the property in question was located in the apartment searched was double hearsay. There the search was of premises on which it was believed that a crime was being committed; here the purpose of the search was to discover evidence of a crime for which Zackular had already been arrested, on premises occupied by a person who had no apparent connection with the crime with which the defendant had been charged.

The Government urges that the dates of the officer's conversation with the defendant can be inferred as being closely related to the time of the application from the fact that a continuing investigation was in progress which began no more than two months before the raid and from the reference to the dates of October 22 and 23 and November 9, 1976 in previous portions of the affidavit. The problem is that these dates refer simply to the arrests of codefendants and are unrelated to the hearsay on which the affidavit was predicated. Other events of greater relevance, e.g., the search of Zackular's home in Winthrop, are described but also without dates being given. The Government points out that searches were sustained in *Andresen* v. *Maryland*, 1976, 427 U.S. 463, and *United States* v. *Steeves*, 8 Cir. 1975, 525 F.2d 33, in which the information set forth in the affidavits was respectively three months and 87 days old when the search warrant was issued. But those cases are distinguishable on the basis that the premises searched belonged to the subjects of the investigations and property sought was of the type which would naturally be kept on premises controlled by the subjects. Also, so far as appears from the officer's affidavit, the critical conversation overheard by the informant may have occurred before the officer's entry into the case on October 24, 1976.

We are unsure how much weight to attach to the following additional circumstances, which could not have been known by the Clerk to whom application for the warrant was made, but mention them in the belief that they support the court's conclusion. On October 29, 1976 the same officer obtained a search warrant for the defendant's apartment in Winthrop from a different district court, the East Boston District Court. That application was similarly based on double hearsay, with a difference. The officer's statement in that application was, "This informant also told me that *within the past few days* 'IT' was present during a conversation that Joseph Zackular had stated he had in his apartment all the stuff, (which was understood by the informant to mean, a check writer . . . ." (Emphasis added.) Obviously the officer understood the importance of specifying a time close to the application for the search warrant. It also developed at the hearing on the instant motions that the search of the defendant's apartment did not produce the checkwriting machine in question and that either the informant was unreliable in that respect or—and this is the key consideration—that the subject was not talking truthfully about the location of incriminating evidence. In our view it is one thing to search the subject's own premises on the basis of such admissions and another to use them as the justification for searching premises of a "present or past wife".[1] Finally, it de-

---

[1] It is difficult to understand how the officer believed that the apartment in Melrose was occupied by Zackular's wife since, in the application dated October 29, 1976 to the East Boston District Court, he listed the defendant and his wife Elizabeth as residing at the apartment in Winthrop.

veloped at the hearing that Zackular was arrested at the time of the successful raid on his house on or about October 29, 1976. Statements by a person, after he has been arrested, as to the location of instrumentalities of the crime seem to us less reliable than alleged statements before his arrest, at least absent the particularization of circumstances which would buttress their reliability. This observation is relevant to the Government's construing the affidavit to mean that the defendant's admission occurred after November 9, 1976.

Decisions on motions to suppress, such as the instant ones, must in the final analysis rest on all the attendant circumstances, especially in our view the type of property being sought and the relationship, if any, of the premises searched to the commission of the offense and of the persons controlling the premises to the crime. Allowances must, of course, be made for the time and other pressures under which law enforcement officers draft their affidavits. It is not expected that they be as comprehensive and precise as legal documents. On the other hand, the element of timeliness of information set out in the officer's affidavit is so essential and well understood by law enforcement personnel that to sustain its omission in a case like this one would, we think, invite the very evils portrayed by Judge Coffin in the *Rosencranz* case.

/s/ W. Arthur Garrity, J.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Number: 78-191-G

[Filed Sep. 7, 1978]

DOCKETED

UNITED STATES OF AMERICA

v.

JOHN SALVUCCI
JOSEPH ZACKULAR

MOTION FOR RECONSIDERATION OF DISTRICT COURT ORDER SUPPRESSING EVIDENCE

Now comes the United States of America by its Attorney, Edward F. Harrington, United States Attorney for the District of Massachusetts and respectfully requests that the Honorable W. Arthur Garrity reconsider his August 18, 1978 Order Suppressing Evidence, and thereafter hold a hearing on the issue of defendant's standing to contest the admissibility of the evidence.

In support thereof, the Government states that after a review of this case, it appears that the defendants did not have sufficient proprietary or possessory interest in the property seized or premises searched to contest the admissibility of evidence in this case. Further, it appears that the defendants do not have "automatic standing" to contest this issue pursuant to *Jones* v. *United States*, 362 U.S. 257 (1960). Therefore, the Government would ask that this Honorable Court now consider the issue of whether the defendants had standing to successfully exclude the property seized in this case, in light

of *Brown* v. *United States*, 411 U.S. 223 (1973), and if deemed necessary schedule a hearing on this issue.

EDWARD F. HARRINGTON
United States Attorney

By: /s/ John W. Laymon
JOHN W. LAYMON
Assistant U.S. Attorney

PROCEDURAL ORDER
9/8/78

The court will give further consideration to the standing issue. Defendants shall file memoranda of law on that issue on or before 9/19/78.

/s/ Garrity, J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Number: 78-191-G

UNITED STATES OF AMERICA

v.

JOHN SALVUCCI AND JOSEPH ZACKULAR

[ORDER—entered September 29, 1978]

Upon reconsideration in light of the parties' memoranda, suppression entered 8/18/78 is reaffirmed.

Garrity, J.

SUPREME COURT OF THE UNITED STATES

No. 79-244

UNITED STATES, PETITIONER

v.

JOHN M. SALVUCCI, JR. and
JOSEPH G. ZACKULAR

ORDER ALLOWING CERTIORARI

Filed December 10, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. The case is set for oral argument in tandem with No. 79-5146, *Rawlings* v. *Kentucky*.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1980 308187 187

No. 79-244

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN M. SALVUCCI, JR., and JOSEPH G. ZACKULAR

BRIEF IN OPPOSITION TO GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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REASONS FOR DENYING THE PETITION

The government in the present case is asking the Court to reassess the validity of the "automatic standing" rule enunciated by this Court in Jones v. United States, 362 U.S. 257 (1960). This case is not an appropriate vehicle for that reassessment since the respondents were charged with crimes that have as an essential element proof of possession of the evidence seized at the time of the contested search and seizure. What Mr. Justice Frankfurter said in Jones, supra, rings true today:

> ...To hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. Jones v. United States, 362 U.S. 257, 261.

The government's argument that Mr. Zackular is vicariously asserting the Fourth Amendment rights of his mother is completely without merit. Alderman v. United States, 394 U.S. 165 (1969). This argument would be true if Mr. äckular was not charged with a crime that includes possession as an essential element. Indeed, the Court's opinion in Rakas v. Illinois, No. 77-5781 (December 5, 1978) supports this contention. There the defendants, indicted for the crime of armed robbery, moved to suppress a shotgun and ammunition found inside a car owned and operated by another party. At the time of the search the defendants were passengers in the car. Finding that the defendants had no legitimate expectation of privacy in the vehicle, the Court ruled that the defendants lacked standing to assert a violation of their Fourth Amendment rights. The Court in Brown v. United States, 411 U.S. 223 (1973) made a similar ruling after finding that the case against the defendants did not depend on possession of the seized evidence at the time of the contested search and seizure.

The distinguishing feature of this case is the crime with which the defendant is charged. Zackular is charged with unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The very nature of this indictment provides him with "automatic standing" to assert a violation of his Fourth Amendment rights. Jones v. United States, supra. The opinions of the Court in Brown v. United States, supra, and Rakas v. Illinois, supra, are not inapposite. It is still true that the Fourth Amendment protects people ---and not simply "areas" --- against unreasonable searches and seizures. Katz v. United States, 389 U.S. 347 (1967); Warden v. Hayden, 387 U.S. 294 (1967); United States v. Miller, 425 U.S. 435 (1976). Accordingly, the respondent suggests that the government is wrong when it asserts that Mr. Zackular's Fourth Amendment rights were not violated by the challenged search. (Government's petition, p. 8) On the contrary, he is, in a very real sense, "a person aggrieved by an unlawful search and seizure". See Rule 41(e) of the Federal Rules of Criminal Procedure. Rule 41 (e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms, while prosecuting for possession. The Court in Jones v. United States, supra, was cognizant of the prosecutorial self-contradiction and ruled accordingly. The doctrine clearly must continue, otherwise every prosecutor would have an advantage in asserting that the defendant did not have possession to justify Fourth Amendment protection, but did have sufficient possession to justify a conviction.

Another factor that has to be taken into consideration in the instant case is the fact that the respondent was certainly a "target" of the state police investigation. See LaFave, Search and Seizure, Volume III, p. 595 et seq. In United States v. Jeffers, 342 U.S. 48 (1951) this Court was confronted with a similar problem. The Court, however, ruled in favor of granting the defendant standing even though the police discovered narcotics in a hotel room rented by two aunts of the defendant. With respect to defendant's standing the Court said:

> ...that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose -- to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being united. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principie which was designed to protect a fundamental right.

Accordingly, in the instant case, the defendant clearly was the target of the search and seizure at his mother's house in Melrose, Massachusetts. The fact that he was not present at the time, and the additional, more important fact that he was charged with a crime that had proof of possession as an essential element militate in favor of automatic standing. In accord with this view are United States v. Alewelt, 532 F. 2d 1165 (7th Cir. 1976); United States v. Kelly, 529 F. 2d 1365 (8th Cir. 1976); United States v. Britt, 508 F. 2d 1052 (5th Cir. 1975); Binkiewicz v. United States, 281 F. Supp. 233 (D. Mass. 1968).

The instant case does not offer the Court the chance to resolve any problems that the doctrine of "automatic standing" may have caused. Even though the respondent had no actual standing, as correctly pointed out by the Court of Appeals, the nature of the indictment and the subsequent action of the state police and the government confer automatic standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 79-244

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN M. SALVUCCI, JR. and
JOSEPH G. ZACKULAR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, JOHN M. SALVUCCI

The respondent, John M. Salvucci, Jr., accepts the statement and question as presented by the government.

Reasons For Not Granting The Petition

In Jones v. United States, 362 U.S. 257 (1960) this Court gave automatic standing to a defendant to contest the illegality of a search and seizure in certain situations. Among those was the situation where possession was an essential element of the crime charged. The government claims that the holding in Jones on this point has been placed in doubt by this Court's decision in Simmons v. United States, 390 U.S. 377 (1968). Notwithstanding decisions cited by the government, the respondent takes issue with this assessment of Simmons.

In Simmons this Court held that it was reversible error to admit at trial testimony given by petitioner at a hearing on a motion to suppress to establish standing. The case did not even remotely relate to or discuss the, "vice of prosecutorial self-contradiction." Indeed, the question could

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not have been presented because the items sought to be suppressed were a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed. Possession of none of these items constituted an essential element of the crime charged.

The government says that a conflict now exists among the circuits on the issue. However, the cases cited did not involve the issue of possession at the time of the search and seizure as an essential element of the crime charged. In United States v. Grunsfeld, 558 F.2d 1231 (6th Cir. 1977), cert. denied, 434 U.S. 872, 1016 (1978), the crime charged was a narcotics conspiracy. In United States v. Delguyd, 542 F.2d 346 (6th Cir. 1976), the crime charged was destroying records to prevent seizure, and resisting government agents in their attempt to execute a search warrant. In United States v. Dye, 508 F.2d 1226 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975), the defendants were convicted of possession of whiskey, but they were not charged with possession at the time of the contested search and seizure. These are the only cases cited by the government in which the Court retreated from the automatic standing rule of Jones.

After all is said and done, it is still squarely contradictory for the government to charge a defendant with possession and at the same time claim that the defendant has no standing to complain because no right of privacy to which he is entitled has been violated. It is this contradictory position taken by the government which should be avoided. The decision in Jones accomplishes this purpose. And, no case since Jones has given any good reason why the government should be allowed to assume such a contradictory position.

In cases where possession is not an essential element of the offense charged, the respondent has no difficulty with the proposition that in order to have standing one must establish a legitimate and reasonable expectation of privacy in the premises searched or the property seized. Rakas v. Illinois, 439 U.S. 128 (1978); Brown v. United States, 411 U.S. 223 (1973). But to deny standing to complain where possession is an essential element permits the government to take advantage of an illegal act while a defendant has no recourse to combat it. It is not the same in other type cases because with or without the questioned evidence, the government still has the opportunity to prove its case. In Rakas and Simmons the physical evidence recovered by allegedly illegal means went a long way toward helping the government prove its case, but it was not necessary in order to obtain convictions of armed robbery. In Brown the actual goods were not essential to the government in proving theft from an interstate shipment, and conspiracy.

Thus, there is a real need to make the distinction this Court made in Jones. If the distinction had not been made, the government would be free in possession cases to ignore completely the Fourth Amendment with nothing to serve as a deterrent.

CONCLUSION

The petition for writ of certiorari should not be granted.

Respectfully submitted

By his attorney,

Willie J. Davis

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 79-244

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN M. SALVUCCI, JR. and
JOSEPH G. ZACKULAR,
Respondents.

CERTIFICATE OF SERVICE

I, Willie J. Davis, counsel for the respondent, John M. Salvucci, Jr., hereby certify that on this 1st day of November, 1979, I served the within Brief in Opposition on the government by mailing two copies thereof to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Office of the Solicitor General, Washington, D.C. 20530; and served on the respondent, Joseph G. Zackular, by mailing two copies thereof to his counsel, John C. McBride, Esquire, 366 Broadway, Everett, Massachusetts 02149.

Willie J. Davis

WILLIE J. DAVIS

Dated: November 1, 1979

No. 79-244

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 599 F.2d 1094. The district court's memorandum and order suppressing evidence (App. 17-20) and its order denying the government's motion for reconsideration (App. 23) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on June 15, 1979. On July 9, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including

August 14, 1979. The petition was filed on that date and was granted on December 10, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant whose constitutional rights were not violated by an unlawful search may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search.

STATEMENT

1. On May 15, 1978, respondents were charged in a federal indictment with 12 counts of unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The indictment was based on 12 checks that had been stolen from the United States mails and that were seized by Massachusetts State Police officers on December 17, 1976, during their search, pursuant to a state warrant, of an apartment rented by the mother of respondent Zackular (Pet. App. 1a-2a, 6a).[1] The indictment charged respondents with possession of the stolen mail from November 7, 1975, through Decem-

[1] The affidavit submitted in support of the application for a search warrant erroneously identified the premises as the apartment of Zackular's wife (Pet. App. 4a n.1), and this error was repeated in the court of appeals' opinion (*id.* at 2a). It was established at a pretrial hearing, however, that the apartment was rented by Zackular's mother (C.A. App. 61, 66; Tr. 45, 50).

ber 17, 1976, the date on which the search occurred (App. 4-9; Pet. App. 10a).

2. Respondents moved to suppress the checks and other evidence found during the search on the ground that the state officer's affidavit supporting the application for the search warrant was inadequate to show probable cause (C.A. App. 11-14). The district court granted those motions and ordered suppression (App. 17-20).[2] The government sought reconsideration of the district court's ruling, contending that respondents lacked standing to challenge the legality of the search and seizure (App. 21-22). By handwritten fiat on the face of the government's motion, the district court reaffirmed its suppression order (App. 23; Pet. App. 2a).

3. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals affirmed (Pet. App. 1a-10a). With respect to the issue of "standing,"[3] the court stated (*id.* at 8a-9a):

> We agree with the Government that neither [respondent] has actual standing to contest the lawfulness of the search and seizures. Neither

[2] The district court held the officer's affidavit to be deficient in relying on double hearsay and in failing to specify both the date on which the informant had engaged in a critical conversation with respondent Zackular and the date on which the informant had conveyed the information so obtained to the officer (App. 17-18).

[3] The court of appeals also affirmed the district court's determination that the affidavit in support of the search warrant was constitutionally inadequate (Pet. App. 2a-8a). We have not presented that issue for review.

> [respondent] has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks.

Nevertheless, the court held that respondents had standing to challenge the search and seizure under the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). It noted that the Court in *Jones* had based the "automatic standing" rule on two considerations (Pet. App. 9a):

> (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. *Id.* [*Jones* v. *United States*] at 261-65; *Brown* v. *United States, supra*, at 229.

After acknowledging that the first consideration had been eliminated by the decision in *Simmons* v. *United States*, 390 U.S. 377, 389-394 (1968), that a defendant's testimony in support of a suppression motion cannot be used against him at trial (Pet. App. 9a), the court of appeals continued (*id.* at 9a-10a):

> The Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vi-

> tality of the doctrine of automatic standing. *See Rakas* v. *Illinois, supra* [47 U.S.L.W.] at 4027 n.4; *Brown* v. *United States, supra* at 228, 229. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. *Compare United States* v. *Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), *and United States* v. *Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), cert. denied, 421 U.S. 990 (1975) (doctrine survives) *with United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve.

Finding that the indictment in this case charged as an element of the offense that respondents were in unlawful possession of the stolen mail on the date of the contested search and seizure, the court held that respondents had "automatic standing" under *Jones* and affirmed the district court's suppression order (Pet. App. 10a).

SUMMARY OF ARGUMENT

As the Court has repeatedly emphasized, the Fourth Amendment protects individuals from unreasonable governmental invasions of their legitimate expectations of privacy. In the absence of such a privacy interest, no right within the purview of the Fourth Amendment arises. In particular, "[a] person who is

aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978). In the instant case, the court of appeals correctly concluded that no Fourth Amendment right of respondents was implicated by the unlawful search of the apartment rented by Zackular's mother.

Absent a violation of their own rights under the Fourth Amendment, respondents cannot seek to suppress evidence seized during this unlawful search. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 133-134, quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Since neither respondent had an "interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises," *Combs* v. *United States*, 408 U.S. 224, 227 (1972) (brackets in original), quoting *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968), they are not entitled to challenge the search and obtain suppression of the seized evidence unless, as the court of appeals held, the "automatic standing" rule permits them to do so.

In *Jones* v. *United States*, 362 U.S. 257 (1960), the Court held that a defendant automatically has "standing" under the Fourth Amendment to contest a search and seizure where he is "charged with an

offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown* v. *United States*, 411 U.S. 223, 229 (1973). In effect, the "automatic standing" rule enables a defendant whose Fourth Amendment rights were not infringed to challenge the legality of the search and seek suppression of the evidence seized on the ground that the search and seizure violated the constitutional rights of someone else.

The Court in *Jones* concluded that a "special problem" (362 U.S. at 261) arises in cases where "[p]ossession [is] the basis of the Government's case against [the defendant]" (362 U.S. at 258) that, for two reasons, warranted departure from the usual principles of the Fourth Amendment. First, the Court found that the customary "standing" requirements subjected defendants charged with possessory offenses to the "dilemma" (362 U.S. at 263) either to forego their Fourth Amendment challenge or to give incriminating testimony against themselves. Second, the Court expressed concern that to apply the "standing" doctrine in such cases would allow the government to take inconsistent positions in the prosecution and thus derogate from the proper administration of the criminal law.

The "automatic standing" rule of *Jones* represents a departure from fundamental Fourth Amendment principles. In our view, the time has come, in light of subsequent developments and further critical analysis, to abolish the "automatic standing" rule.

The first concern underlying the rule—the "dilemma" that, in order to establish his actual "standing," a defendant charged with a possessory offense might have to give testimony at a suppression hearing that the prosecution could use at trial to prove his guilt—has been eliminated by this Court's later decision in *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection" (*id.* at 394). In light of *Simmons*, "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution." *Brown* v. *United States*, *supra*, 411 U.S. at 228.

Nor can the "automatic standing" rule be justified by the asserted "vice of prosecutorial self-contradiction" whereby "the Government * * * allege[s] possession as part of the crime charged, and yet den[ies] that there was possession sufficient for standing purposes" (*Brown* v. *United States*, *supra*, 411 U.S. at 229). The Fourth Amendment proscribes unreasonable governmental intrusions upon individuals' legitimate expectations of privacy. The provisions of the penal code defining possessory offenses, on the other hand, are premised on different considerations and are directed at different ends from the privacy protections of the Fourth Amendment. *Jones* failed to recognize that the concept of "possession" can have different

meanings in the context of the Fourth Amendment, where it helps to illuminate the existence of a legitimate expectation of privacy, and in the context of the criminal law, where it serves to demarcate antisocial conduct and culpable behavior. This relationship between the criminal law and the Fourth Amendment is well illustrated by the concept of constructive possession, which the criminal law rightly condemns as illegal activity, but which does not give rise to a reasonable expectation of privacy that is infringed by an unlawful search of a third party. Thus, there is nothing "contradictory" in "subject[ing] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one [whose privacy interests have been breached by an unreasonable search and seizure]" (362 U.S. at 263).

ARGUMENT

SINCE THEIR FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED, RESPONDENTS CANNOT SEEK TO SUPPRESS EVIDENCE SEIZED DURING THE UNLAWFUL SEARCH OF A THIRD PARTY'S APARTMENT

A. No Fourth Amendment Right Of Respondents Was Violated By the Unlawful Search Of A Third Party's Apartment

As the Court has repeatedly emphasized, "the Fourth Amendment * * * protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977). See also, *e.g.*, *id.*

at 11; *Rakas* v. *Illinois*, 439 U.S. 128, 143 & n.12 (1978); *United States* v. *Miller*, 425 U.S. 435, 440 (1976); *Combs* v. *United States*, 408 U.S. 224, 227 (1972); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Katz* v. *United States*, 389 U.S. 347 (1967); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). Absent a legitimate expectation of privacy, no interest cognizable by the Fourth Amendment is implicated by a governmental search or seizure. In particular, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman*, *supra*, at 174." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 134. See also *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172.

In the instant case, no Fourth Amendment rights of respondents were affected by the unlawful search of the apartment rented by Zackular's mother. The government's motion for reconsideration in the district court contended that respondents "did not have sufficient proprietary or possessory interest in the property seized or premises searched to contest the admissibility of evidence in this case" (App. 21), and neither respondent replied by asserting that he had a legitimate privacy interest of any sort in the searched apartment. Indeed, respondent Zackular expressly acknowledged in his brief to the court of appeals that "he was not on the premises at the time of the contested search and * * * did not testify at

the hearing on the motion to suppress that he had a proprietary interest in the searched premises" (Br. at 13, No. 78-1529 (1st Cir.)). Rather than claiming any legitimate expectation of privacy, respondents have relied solely on their "automatic standing" to contest the legality of the search. In these circumstances, the court of appeals correctly concluded (Pet. App. 8a-9a) that "neither [respondent] has actual standing to contest the lawfulness of the search and seizures. Neither [respondent] has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks." [4]

B. Absent A Violation Of Their Own Fourth Amendment Rights, Respondents Cannot Seek To Suppress Evidence Seized During An Unlawful Search

1. Respondents Cannot Assert The Fourth Amendment Rights Of Other Persons

It is well settled that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas*

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[4] Since respondents had an adequate opportunity but failed to raise any privacy interest that would entitle them to challenge the search, the appropriate disposition of the case, in the event the Court agrees with our contention that the "automatic standing" rule should be abolished, would be to deny respondents' motions to suppress rather than to remand for further factual proceedings on the suppression issue. Compare *Rakas* v. *Illinois*, *supra*, 439 U.S. at 130-131 n.1, with *Combs* v. *United States*, *supra*, 408 U.S. at 227-228. See also *Brown* v. *United States*, 411 U.S. 223, 230 (1973).

v. *Illinois, supra,* 439 U.S. at 133-134, quoting *Alderman* v. *United States, supra,* 394 U.S. at 174.[5] With the exception of the "automatic standing" rule, this Court has never recognized "an independent constitutional right of [defendants] to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment." *Alderman* v. *United States, supra,* 394 U.S. at 174. See also, *e.g., id.* at 171-172; *Rakas* v. *Illinois, supra,* 439 U.S. at 133-138; *Zurcher* v. *Stanford Daily,* 436 U.S. 547, 562 n.9 (1978); *United States* v. *Miller, supra,* 425 U.S. at 444-445; *Brown* v. *United States, supra,* 411 U.S. at 230. Rather, "standing" to invoke the exclusionary rule depends on whether the defendant "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises." *Combs* v. *United States, supra,* 408 U.S. at 227 (brackets in original), quoting *Mancusi* v. *DeForte, supra,* 392 U.S. at 368.

[5] The Court in *Rakas* abandoned the concept of "standing" under the Fourth Amendment, stating that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing" (439 U.S. at 139). In this analysis the relevant "question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect" (439 U.S. at 140).

Since, as discussed above, none of their Fourth Amendment rights was violated, respondents cannot seek to suppress the evidence seized during the unlawful search unless, as the court of appeals held, the "automatic standing" rule permits them to do so.[6]

2. *The "Automatic Standing" Rule Of* Jones v. United States *Should Be Overruled*

a. In *Jones* v. *United States,* 362 U.S. 257 (1960), the Court held that a defendant automatically has "standing" under the Fourth Amendment to move to exclude from evidence an item that was seized during an assertedly illegal search where possession of the item by the defendant at the time of the search constitutes an essential element of the offense charged.[7] As the Court has most recently explained it, the "automatic standing" rule is applicable where the defendant is "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown* v. *United States, supra,* 411 U.S. at 229. See also *Simmons* v. *United States,* 390 U.S. 377, 390 (1968).

[6] By the same token, since their Fourth Amendment rights were not violated, respondents cannot invoke any of the remedies, such as a damage action, provided for victims of unconstitutional searches and seizures. Compare *Rakas* v. *Illinois, supra,* 439 U.S. at 134; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

[7] The defendant in *Jones* was also held to have standing (362 U.S. at 265-267) because of his legitimate expectation of privacy in the premises that were searched. See *Rakas* v. *Illinois, supra,* 439 U.S. at 141, 143.

In *Jones*, the defendant was charged with various possessory narcotics offenses. Under the pertinent statutes, the defendant could have been convicted "through proof solely of possession of narcotics" (362 U.S. at 261). Thus, "[p]ossession was the basis of the Government's case against [the defendant]" (362 U.S. at 258).

The Court in *Jones* recognized the established requirements that to have "standing" a defendant "must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. * * * Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy" (362 U.S. at 261).[8] However, it concluded that cases

[8] The Court also stated (362 U.S. at 261):

> [Fed. R. Crim. P.] 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." *Hatch* v. *Reardon*, 204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

"like this one have presented a special problem" (362 U.S. at 261) that, for two reasons, warranted departure from the usual principles of Fourth Amendment "standing."

First, the Court found that the customary "standing" requirements subjected defendants charged with possessory offenses to the "dilemma" (362 U.S. at 263) either to forego their Fourth Amendment challenge or to give incriminating testimony against themselves:

> To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession. [362 U.S. at 261-262.]

Second, the Court expressed concern that to apply the "standing" doctrine in cases like *Jones* would allow the government to take inconsistent positions in the prosecution and thus would derogate from the proper administration of the criminal law:

> [T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. [362 U.S. at 263-264.]

Thus, the doctrine of "automatic standing" was originally devised to serve the interrelated aims of (1) relieving a defendant from the dilemma in which, in order to assert his Fourth Amendment suppression claim, he would have to give testimony that the government could directly use against him at trial to prove his guilt, and (2) avoiding the "vice of prosecutorial self-contradiction" (*Brown* v. *United States*,

supra, 411 U.S. at 229) in the government's denying that the defendant had a possessory interest for purposes of the Fourth Amendment suppression claim while at the same time alleging defendant's possession as part of the offense charged.[9]

As discussed above (pages 11-13, *supra*) and as recognized in *Jones* itself (362 U.S. at 261, 263), the "automatic standing" rule constitutes a departure from fundamental Fourth Amendment precepts, for it "may allow a defendant to assert the Fourth Amendment rights of another" (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 135 n.4). In our view, the time has come, in light of subsequent developments and further critical analysis, to abolish the "automatic standing" rule of *Jones*.[10]

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[9] Thus, "automatic standing" was directed not to the privacy interests embodied in the Fourth Amendment but rather to a problem of self-incrimination and the perceived impropriety of the government's position in criminal cases.

[10] The Court noted in *Rakas* that it has "not yet had occasion to decide whether the automatic-standing rule of *Jones* survives [the] decision in *Simmons* v. *United States*, 390 U.S. 377 (1968)" (439 U.S. at 135 n.4). See also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 160 n.6 (White, J., dissenting); *Brown* v. *United States*, *supra*, 411 U.S. at 228-229; *Combs* v. *United States*, *supra*, 408 U.S. at 227 n.4.

The courts of appeals are divided on the continued applicability of the "automatic standing" rule. The Sixth Circuit has abandoned the rule in light of *Simmons* v. *United States*, *supra*. See *United States* v. *Killebrew*, 594 F.2d 1103 (6th Cir. 1979); *United States* v. *Grunsfeld*, 558 F.2d 1231, 1241-1242 (6th Cir.), cert. denied, 434 U.S. 872 (1977), 1016 (1978); *United States* v. *Hunter*, 550 F.2d 1066, 1072-1075 (6th Cir. 1977); *United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir.

b. The first concern underlying the *Jones* "automatic standing" rule—the "dilemma" that, in order to establish his actual "standing," a defendant

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1976); *United States* v. *Dye*, 508 F.2d 1226, 1232-1234 (6th Cir. 1974), cert. denied, 420 U.S. 947 (1975). The Tenth Circuit has suggested that it reads *Simmons* and *Brown* to repudiate the "automatic standing" rule. See *United States* v. *Smith*, 495 F.2d 668, 670 (10th Cir. 1974). The Fifth Circuit has expressed "serious doubts concerning the viability of the 'automatic standing' rule in light of *Simmons* v. *United States*" (*United States* v. *Edwards*, 577 F.2d 883, 892 (5th Cir.) (en banc), cert. denied, 439 U.S. 968 (1978)); see also 577 F.2d at 896 (five judges concluding that the "automatic standing" rule should be eliminated); *United States* v. *Archbold-Newball*, 554 F.2d 665, 679 (5th Cir.), cert. denied, 434 U.S. 1000 (1977). Nonetheless, it has continued to apply the rule. See, *e.g.*, *United States* v. *Reyes*, 595 F.2d 275, 279 (5th Cir. 1979); *United States* v. *Ullrich*, 580 F.2d 765, 768 (5th Cir. 1978). The Second Circuit, while expressing "misgivings about the continued survival of the concept of automatic standing" (*United States* v. *Oates*, 560 F.2d 45, 52 (2d Cir. 1977)), has stated "that overruling *Jones* is properly a matter for the Supreme Court" (*United States* v. *Galante*, 547 F.2d 733, 737 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977)); see also *United States* v. *Penco*, No. 78-1182 (2d Cir. Sept. 6, 1979), slip op. 4511; *United States* v. *Ochs*, 595 F.2d 1247, 1253 n.4 (2d Cir.), cert. denied, No. 79-203 (Nov. 13, 1979); *United States* v. *Riquelmy*, 572 F.2d 947, 950-951 (2d Cir. 1978); *United States* v. *Oates*, *supra*; *United States* v. *Banerman*, 552 F.2d 61, 63 (2d Cir. 1977). The Eighth Circuit has also declared that it will adhere to the "automatic standing" rule in the absence of a clear mandate from this Court. See *United States* v. *Anderson*, 552 F.2d 1296, 1299 (8th Cir. 1977); see also *United States* v. *Kelly*, 529 F.2d 1365, 1370-1371 (8th Cir. 1976); but see *United States* v. *Barber*, 557 F.2d 628, 633-634 (8th Cir. 1977). In addition, the Ninth Circuit continues to follow the doctrine of "automatic standing." See *United States* v. *Powell*, 587 F.2d 443, 446 (9th Cir. 1978); *United States* v. *Abascal*, 564 F.2d 821, 829

charged with a possessory offense might have to give testimony at a suppression hearing that the prosecution could use at trial to prove his guilt—has been eliminated by this Court's later decision in *Simmons* v. *United States*, 390 U.S. 377 (1968). *Simmons* was a prosecution for bank robbery in which FBI agents searched the house of defendant Andrews' mother and uncovered two suitcases in the basement; one of the suitcases was found to contain a gun holster, a sack similar to the one used in the bank robbery, and several coin cards and bill wrappers from the bank that had been robbed (390 U.S. at 380). In order to establish his "standing" to challenge this search and the introduction into evidence of the items seized, defendant Garrett testified at the suppression hearing that the suitcase was similar to one he owned and that he was the owner of the clothing discovered in the suitcase (390 U.S. at 381). Garrett's motion to suppress was denied, and his testimony at the suppression hearing was admitted into evidence against

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(9th Cir. 1977), cert. denied, 435 U.S. 942, 953 (1978); *United States* v. *Haddad*, 558 F.2d 968, 974-975 (9th Cir. 1977); *United States* v. *Jamerson*, 549 F.2d 1263, 1267-1269 (9th Cir. 1977); *United States* v. *Boston*, 510 F.2d 35 (9th Cir. 1974), cert. denied, 421 U.S. 990 (1975). The Fourth and Seventh Circuits also appear to recognize the possibility of "automatic standing." See *United States* v. *Lang*, 527 F.2d 1264, 1266 (4th Cir. 1975), cert. denied, 424 U.S. 920 (1976); *United States* v. *Alewelt*, 532 F.2d 1165, 1167 (7th Cir.), cert. denied, 429 U.S. 840 (1976). And in the instant case the First Circuit held (Pet. App. 9a-10a) that despite *Simmons*, *Brown* and *Rakas*, it would abide by the "automatic standing" rule until the Court passes on the issue.

him as part of the government's case-in-chief at trial.[11]

On review of Garrett's conviction, this Court reversed. It found that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). It also noted that, although as an "abstract matter" the testimony at the suppression hearing was voluntary (390 U.S. at 393), Garrett "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another" (390 U.S. at 394).[12] Accordingly, the Court held that

[11] In the absence of use immunity of the sort recognized in *Simmons*, a defendant's suppression testimony could, as an admission, be introduced as substantive evidence against him in the prosecution's case-in-chief.

[12] The *Simmons* self-incrimination analysis has subsequently been questioned by the Court. In *McGautha* v. *California*, 402 U.S. 183 (1971), the Court, in re-examining the rationale of *Simmons*, explained that "the purely Fifth Amendment interests involved in *Simmons*" were "insubstantial[]" (402 U.S. at 212) and that, "to the extent that * * * [*Simmons*] was based on a 'tension' between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question" (*ibid.*). Cf. *United States* v. *Kahan*, 415 U.S. 239 (1974); but see *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 807-808 (1977). However, the Court in *McGautha* had "no occasion to question the soundness of the

"when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection" (*ibid.*).

In light of *Simmons*, the Court's first concern in *Jones* has been resolved.[13] "The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution [in *Simmons*]." *Brown* v. *United States*, *supra*, 411 U.S. at 228.[14] Thus, the continued

result in *Simmons* and [did] not do so" (402 U.S. at 212), for it found that *Simmons* was based on adequate Fourth Amendment grounds (402 U.S. at 211):

> In *Simmons* we held it unconstitutional for the Federal Government to use at trial the defendant's testimony given on an unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. We concluded that to permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior. This was surely an analytically sufficient basis for decision.

[13] Indeed, because *Simmons* applies to all cases (390 U.S. at 390-392), while *Jones* extends only to "offense[s] that include[], as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure" (*Brown* v. *United States*, *supra*, 411 U.S. at 229), the protection recognized in *Simmons* is broader than that afforded by *Jones*.

[14] One commentator has suggested that, to the extent *Simmons* permits a defendant's testimony on his suppression motion to be used to impeach his testimony at trial, the "automatic standing" rule should be retained. 3 W. LaFave,

validity of the "automatic standing" rule rests solely on the asserted "vice of allowing the Government to allege possession as part of the crime charged, and

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Search and Seizure: A Treatise on the Fourth Amendment § 11.3, at 588-589 (1978).

While the delineation of *Simmons* is not presented in this case except insofar as it might bear on the "automatic standing" issue, we note our view that *Simmons* does not prohibit the prosecution from using the defendant's prior testimony for impeachment purposes at trial. *Simmons* renders the defendant's suppression testimony inadmissible "against him at trial on the issue of guilt" (390 U.S. at 394). "[W]hether he succeeds or fails to suppress the evidence, his testimony on that score is not *directly* admissible against him in the trial." *Brown* v. *United States, supra,* 411 U.S. at 228 (emphasis added). As the Court recognized in *United States* v. *Kahan,* 415 U.S. 239, 243 (1974), in holding that a defendant's false statement at arraignment that he was without funds to retain a lawyer could be used against him at trial to prove the requisite state of mind for improperly receiving a gratuity and perjury, "[t]he protective shield of *Simmons* is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." See also *Oregon* v. *Hass,* 420 U.S. 714 (1975); *Harris* v. *New York,* 401 U.S. 222 (1971); *Walder* v. *United States,* 347 U.S. 62 (1954).

However, it does not follow, as Professor LaFave suggests, that to allow a defendant's suppression hearing testimony to be used for impeachment at trial would present the type of self-incrimination "dilemma" that concerned the Court in *Jones.* The prospect that earlier testimony might be used at trial solely for impeachment purposes is legitimate cause for apprehension only if the defendant intends to "use perjury by way of a defense" (*Harris* v. *New York, supra,* 401 U.S. at 226). His "dilemma," then, is not, as in *Jones,* that if he tells the truth at the suppression hearing, he virtually confesses his guilt of the possessory offense. It is, rather, that if he speaks truthfully on one occasion, he impairs his ability to make contradictory statements on the other. But any time

yet deny that there was possession sufficient for standing purposes" (*id.* at 229).

c. In our view, the "automatic standing" rule—a rule that authorizes a defendant whose Fourth Amendment rights have not been violated to seek suppression of reliable and probative evidence—cannot be justified by "this vice of prosecutorial self-contradiction" (*Brown* v. *United States, supra,* 411 U.S. at 229). Indeed, we submit that no such "vice" arises in situations governed by the "automatic standing" rule.

The Court in *Jones* was concerned that to permit the prosecution to contest the "standing" of a defendant charged with a possessory offense would be to "subject[] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of

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a person testifies under oath he is "under an obligation to speak truthfully and accurately" (*Harris* v. *New York, supra,* 401 U.S. at 225). Accordingly, it would seem particularly inappropriate to relax the requirements for "standing" to suppress simply to "free [the defendant] from the risk of confrontation with prior inconsistent utterances" (*id.* at 226). Such action is simply not necessary to satisfy the purpose of *Simmons* to afford the defendant an adequate opportunity to assert his Fourth Amendment claims. See note 12, *supra.*

To the extent that "such use [for impeachment] create[s] an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior" (*McGautha* v. *California, supra,* 402 U.S. at 211), the appropriate course would be to extend the scope of *Simmons,* not to perpetuate the "automatic standing" rule.

the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government" (362 U.S. at 263-264). This analysis, however, rests on a fundamental confusion concerning distinct elements in the criminal law and the Fourth Amendment.

As discussed above (pages 9-10, *supra*), the Fourth Amendment proscribes unreasonable governmental intrusions upon individuals' legitimate expectations of privacy. To invoke this constitutional protection, therefore, a person must assert a violation of his own legitimate privacy interest (see pages 11-12, *supra*). In the language of *Jones* (362 U.S. at 263), "the remedies designed for one" whose Fourth Amendment rights have been infringed derive from this fundamental principle of privacy.

It is not in any way inconsistent with this principle for the government to charge a defendant with a possessory offense defined in the criminal law and, at the same time, to contend that no legitimate privacy expectation of the defendant's under the Fourth Amendment was implicated in the search and seizure that uncovered the items illegally possessed. The provisions of the penal code regarding possessory offenses are premised on different considerations and are directed at different ends from the privacy protections of the Fourth Amendment. *Jones* failed to recognize that the concept of "possession" can have different meanings in the context of the criminal law, where it serves to demarcate antisocial conduct and culpable behavior, and in the context of the Fourth

Amendment, where, as the Court explained in *Rakas* (439 U.S. at 143-144 n.12), it helps to illuminate the existence of a legitimate expectation of privacy. See *United States* v. *Hunter*, 550 F.2d 1066, 1074 (6th Cir. 1977).[15] Thus, there is nothing "contradictory" in "subject[ing] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one [whose privacy interests have been breached by an unreasonable search and seizure]" (362 U.S. at 263).

This relationship between the criminal law and the Fourth Amendment can best be illustrated by the well-recognized concept of constructive possession.[16]

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[15] "By employing the term 'possession' in *Jones* to define both what the law bans as criminal and the scope of the fourth amendment's protection, Justice Frankfurter fell prey to the 'tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them * * *. [This tendency] has all the tenacity of original sin and must constantly be guarded against.'" Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421, 437-438 (1975), quoting Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933).

[16] "[C]onstructive possession means being in a position to exercise dominion or control over a thing." *United States* v. *Holland*, 445 F.2d 701, 703 (D.C. Cir. 1971) (footnote omitted). Constructive possession has been "defined as such a 'nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession.'" *United States* v. *Carneglia*, 468 F.2d 1084, 1087 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), quoting *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965). See also, *e.g.*, *United*

A defendant who exercises dominion and control over a proscribed item, even though he does not physically possess it, has engaged in conduct that the penal code rightly condemns. At the same time, however, if the police search the premises of a third person and discover that item, the defendant has not suffered, by virtue of his wrongful constructive possession, any intrusion upon his privacy interest.

> [O]ne may be in lawless—albeit constructive—possession for purposes of the criminal law, but have no possession for purposes of the fourth amendment. * * * [T]here is nothing inconsistent in saying that a defendant possesses or once possessed contraband in a way that brings him within the penal law but did not or does not now possess the contraband in a manner that is relevant to the purposes of the fourth amendment.
>
> * * * * *
>
> The concept of "possessory interest" is then properly recognized as contextual. It is evident, therefore, that there was no contradiction present when the Government denied in *Jones* that the defendant had possession of narcotics for fourth amendment purposes while at the same time seeking to prove possession within the meaning of the penal law.

Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421, 437, 444 (1975). See also *United States* v. *Hunter*, *supra*, 550 F.2d at 1074; Gutterman, "*A Person*

States v. *Staten*, 581 F.2d 878, 883 & n.45 (D.C. Cir. 1978); *United States* v. *DiNovo*, 523 F.2d 197, 201 (7th Cir.), cert. denied, 423 U.S. 1016 (1975).

Aggrieved": *Standing to Suppress Illegally Seized Evidence in Transition*, 23 Emory L.J. 111, 125-127 (1974).[17]

The absence of any inherent contradiction is clearly shown by the facts of the present case. It may be assumed, as the government will seek to prove at trial, that respondents, having come into unlawful possession of stolen mail, determined that it would be desirable to keep it at the apartment of Zackular's mother until such time as they chose to reclaim it. Their sole interest in that apartment, however, was as a repository for their contraband. In such circumstances, the law properly recognizes their culpable

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[17] For example, in *County Court of Ulster County, New York* v. *Allen*, No. 77-1554 (June 4, 1979), defendants were convicted of illegally possessing firearms. The convictions were based on each defendant's constructive possession of the firearms (slip op. 23), which were discovered in a car in which the defendants were riding. However, to the extent they had no legitimate expectation of privacy in the areas of the automobile that were searched (slip op. 2-3), the defendants did not, under *Rakas* v. *Illinois*, *supra*, have any Fourth Amendment interest that would have entitled them to challenge the legality of the search or to seek exclusion of the evidence seized. In these circumstances, it would not be "contradictory" for the government both to prosecute on the possessory offense and to contend that the defendants should not be heard to contest the legality of the search.

In addition to constructive possession, other instances exist where a defendant is charged with a possessory offense but has no legitimate privacy interest under the Fourth Amendment. Thus, a defendant who aids and abets another's unlawful possession is deemed to have committed that possessory offense as a principal, yet he would have no Fourth Amendment interest in the search of his confederate's premises that uncovered the illegally possessed item. See *United States* v. *Oates*, 560 F.2d 45, 53-56 (2d Cir. 1977).

possession of the stolen mail at the time of its seizure, despite the fact that they have not the slightest basis for claiming any invasion of their personal privacy interests from the search. In no sense can the government fairly be charged with self-contradiction in this situation.

Thus, to charge a defendant with a possessory offense, but to urge that he cannot invoke the Fourth Amendment and the exclusionary rule unless he demonstrates a personal interest reflecting a legitimate expectation of privacy, is not tantamount to "squarely contradictory assertions of power by the Government" (*Jones* v. *United States, supra,* 362 U.S. at 264).[18]

[18] In our view, the "automatic standing" rule also suffers from two additional analytical defects: first, it treats a possessory interest in the items *seized* as sufficient to permit a Fourth Amendment challenge to the underlying *search,* and, second, it assumes that a defendant can have a legitimate Fourth Amendment interest in contraband, which by definition can only be illegally possessed. We submit that such propositions are unsound, not only for purposes of the "automatic standing" rule, but also as a matter of general Fourth Amendment doctrine. These questions are presented in the government's pending petition for a writ of certiorari in *United States* v. *Conway,* No. 79-393 (filed Sept. 7, 1979), a copy of which has previously been provided to counsel for respondents here. It also appears that these issues are raised in *Rawlings* v. *Kentucky,* cert. granted, No. 79-5146 (Dec. 10, 1979), which is to be argued in tandem with the instant case. It is unnecessary for the Court to reach these more general issues in order to overturn the "automatic standing" rule.

Moreover, apart from its analytical deficiencies, the rationale of "prosecutorial self-contradiction" offered to support the "automatic standing" rule is simply inadequate to justify the heavy societal costs that result from the exclusion of reliable and probative evidence at trial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. SALVUCCI, JR., ET AL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT JOHN M. SALVUCCI, JR.

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ARGUMENT

THE "AUTOMATIC STANDING" RULE OF *JONES V. UNITED STATES* AFFORDS POSSESSORY INTERESTS THE PROTECTION OF THE FOURTH AMENDMENT IN A WAY CONSONANT WITH THE EFFICACIOUS ADMINISTRATION OF JUSTICE AND HENCE SHOULD NOT BE OVERTURNED.

A. The "Automatic Standing" Rule Was First Enunciated In *Jones v. United States.*

The principle that a defendant automatically has "standing" under the Fourteenth Amendment to move to exclude from evidence an item that was seized during an assertedly illegal search where possession of the item by the defendant at the time of the search constitutes an essential element of the offense charged was first formulated in *Jones v. United States,* 362 U.S. 257 (1960). The defendant in Jones was charged with having "purchased, sold, dispensed and distributed" narcotics in violation of the federal statutes which require that narcotics be in or from the "original stamped package" and with having "facilitated the concealment and sale of" the same narcotics, knowing them to have been illegally imported into the United States. *Jones v. United States, supra.* at 258. Both statutory provisions under which Jones was prosecuted would have permitted conviction upon proof of the defendant's possession of narcotics, and in the case of the first charge, of the absence of the appropriate stamps (362 U.S. at 258). Thus, "possession was the basis of the government's case against [the defendants']." (322 U.S. at 258).

The Court in Jones assessed the purpose of the Fourth Amendment as follows: "The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property." (362 U.S. at 261). The standing to assert a Fourth Amendment claim, the Court in Jones said, is contingent upon the defendant establishing that he or she, "must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a

consequence of a search or seizure directed at someone else. Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy" (362 U.S. at 261). The Court concluded that in the limited Jones-type situation, where possession by the defendant of a seized item would both confer standing and entail conviction, any necessity for a preliminary showing of an interest in the premises searched or the property seized was eliminated. Justice Frankfurter, writing for a unanimous Court in Jones, justified the "automatic standing" rule upon an examination of the Fourth Amendment and the inherent possessory interest in the Jones indictment.

The Court expressed the concern that the defendant should not be placed in the "dilemma" (362 U.S. at 263) of having to testify against him or herself in the context of a criminal charge of possession:

> To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable

holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession. [362 U.S. at 261-262.]

The Court also declared that to apply the "standing" doctrine in cases like Jones would allow the injustice of an internally inconsistent conviction, a social concern that Rule 41(e) should protect against:

> [T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it midly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. [362 U.S. at 263-264].

The Government's argument to the contrary essentially invokes *elegantia juris* * * * As codified, the rule [41e] is not a rigid one, for under Rule 41(e) "the court in its discretion may entertain the motion [to suppress] at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an internally inconsistent conviction.

The doctrine of "automatic standing" was thus designed

to avoid the prosecutorial self-contradiction of indicting for possession at the time of the search, while denying that the defendant's possessory interest constitutes, "a person aggrieved by an unlawful search and seizure." The dilemma is all the more grievous when, in order to assert his or her suppression claim, the defendant would need to give testimony that the government could use at trial to aid in the proof of the defendant's guilt.

The Court has not overturned the Jones "automatic standing" rule during the last twenty years. *Brown v. United States,* 411 U.S. 223, 228 (1973); *Rakas v. Illinois,* 439 U.S. 128, 135 (1978). The present case squarely confronts the viability of the Jones holding. The rule should be affirmed in this case. For to abolish the "automatic standing" rule of Jones would unnecessarily jeopardize the fair administration of justice vis-a-vis defendants whose Fourth Amendment rights are implicated by the criminal possessory charge.

B. Assertion Of A Possessory Interest In A Seized Item Gives A Defendant Standing Under The Fourth Amendment.

The core underpinning of the Jones decision is that possession for purposes of criminal conviction at the time of sizure is the same type of possession required to establish standing under the Fourth Amendment (362 U.S. at 261). An examination of the Fourth Amendment's language, and purpose, and interpretive case law demonstrates that a possessory interest in a seized item constitutes a sufficient personal interest to warrant standing.

The Fourth Amendment recognizes, "The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures." Indeed, by its language property interests are protected by the Fourth Amendment. Early case law required an actual infringement on defendant's property interests to trigger Fourth Amendment protections. See, e.g. *Olmstead v. United States,* 277 U.S. 438 (1928); *Berger v. New York,* 388 U.S. 41 (1967); *Lanzo v. New York,* 370 U.S. 139 (1962); *United States v. Jeffers,* 342 U.S. 48 (1951). While the Court in *Jones v. United States* recognized that the Fourth Amendment protects property interests in the object of the search, it also expanded Fourth Amendment standing by defining injury to include both invasions of privacy and property interests [362 U.S. at 261].[1] Jones recognized the artificiality of a strict limitation to property interests and held that anyone, "legitimately on the premises" had a sufficient interest of privacy in that premises, the invasion of which is a sufficient injury to give rise to standing to object to a search of the premises. The Court did not, however, eliminate the older concepts which allowed standing based on violations of property rights. The progeny of Jones have consistently recognized that a violation of a defendant's possessory interests in a seized item constitutes a personal grievance protected by the Fourth Amendment.

In *Simmons v. United States,* 390 U.S. 377 (1968), holding that defendant's testimony given in an attempt to establish standing could not be admitted against him at trial, the Court noted in passing that, "the most natural way in which he [the defendant] could find standing to object to the admission of the suitcase" found on the premises of his accomplices' mother, "was to testify that he was its owner."

[1]This interest had been recognized earlier in *Boyd v. United States,* 116 U.S. 616 (1886), but had not been interpreted to give rise to standing without a showing of a possessory or proprietary interest.

Simmons v. United States, supra at 391.

Similarly, in *Combs v. United States,* 408 U.S. 224 (1972), where the property sought to be suppressed had been stolen and was seized from the farm of defendant's father, and defendant neither lived there nor was present at the time of the search, the Court remanded for a standing determination, thereby implying that one could have a privacy interest in stolen goods sufficient to confer standing.

In *Brown v. United States,* 411 U.S. 223 (1973) a case in which defendants were denied standing to challenge the seizure of stolen goods from the store of a third party, the Court noted that, "the petitioners were afforded a full hearing on standing and failed to allege any legitimate interest of any kind in the premises searched or the merchandise seized." *Brown v. United States, supra.* at 229. The Court had earlier emphasized the relevance of a possessory claim to the goods by stating: "Thus, petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the [stolen] goods at Knuckle's Store without any danger of incriminating themselves." *Brown v. United States* at 228.

Fourth Amendment standing through possessory interest in the seized item was analogously noted in *Alderman v. United States,* 394 U.S. 165 (1969) which focused on the standing requirements to challenge evidence which grew out of illegally overheard conversations. The Court stated the requirements for a Fourth Amendment violation as follows: "Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." *Alderman v. United States, supra* at 176. Thus, by establishing that conversations are one's own there is standing.[2]

[2]The Court in *Rakas v. Illinois,* 439 U.S. 128 (1978), while not addressing the right of standing based solely on possession of the item seized, did note that the defendants had not asserted ownership of the rifle or shells seized.

The Fourth Amendment has recognized standing based on possessory interests due to the fundamental policy of protecting against arbitrary government invasions of person's property and privacy. *Jones v. United States,* 362 U.S. at 261. A person at common law had certain remedies to combat arbitrary searches and seizures. If an individual was arrested without proper justification, he or she had a valid cause of action for false imprisonment.[a] For a breach of the security of his or her home, an action in trepass was available.[b] For improper seizure of his goods, an action of replevin or conversion provided relief.[c] The Fourth Amendment protections should be guided at a minimum by common law property rights because a goal of the Fourth Amendment was to provide the citizen with at least the same protections against the government which were potentially present against other citizens for violations of one's property rights. See Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing To Challenge Searches and Seizures, 40 Mo. L. Rev. 1 (1975). Furthermore, the expanded concept of invasion of privacy should not exclude property interests but should encompass the expectation that one's property will not be arbitrarily violated by the government.

The definition of an interest in property should not turn on actual possession at the time of the seizure. Although actual possession is crucial to the Fifth Amendment issue of whether one is forced to incriminate himself or herself by their own conduct (personally surrendering incriminating evidence), the right to assert control or ownership should be

[a]Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).

[b]Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763).

[c]See E. Wells, Replevin (2d ed. 1907).

the touchstone in analysing Fourth Amendment rights. The right to protection from a search of one's home even when the person was not present in the home was recognized in *Brown v. United States, supra.* Thus, it is not the presence of the defendant's body which is required to confer a privacy or property right. Likewise, goods placed with a third person, constitutes a property and privacy interest that those goods will be protected from intrusion by others.[3] The Fourth Amendment expressly provides for protection of one's possessions. An assertion of "possession," regardless of the location of the goods, should trigger a Fourth Amendment claim.

For purposes of Fourth Amendment claims, it should also not matter whether the items seized from the defendant were stolen goods. Property rights are not dependent on the legitimacy of the possession except with respect to people with a better right of possession.[4] Moreover, there is the policy consideration that the Fourth Amendment would provide little protection to property rights if the government can, after the fact, get around the amendment by showing the defendant's interests were not legitimate. The Court should be particularly sensitive to this policy argument in the context of possessory crimes where the wrongfully seized item would serve to convict the defendant. An assertion of possessory control in a seized good should confer standing

[3]If the goods were left with the intent of abandonment then arguably there remains no possessory interest. The automatic standing rule is, however, only limited to possessory crimes where the goods were "possessed" at the time of the seizure. Abandoned goods would also not constitute "possession" for criminal purposes. See *Parman v. United States,* 399 F.2d 559 (D.C. Cir. 1968); *United States v. Bozza,* 365 F.2d 206 (2nd Cir. 1966).

[4]This is the doctrine of Jus Tertii, which is applicable even to the government. See, *Knox, supra.* at p. 26, fn. 179.

under the Fourth Amendment without an analysis of the defendant's legitimacy to ownership.

The government's attempt to prove possession in the present case is an admission of the defendant's possessory interest. The interference with a possessory interest is a seizure and the defendant should have standing to challenge that seizure.[5] In the present case, where the police knew in advance that they were looking for stolen mail in the searched house, they should be held as unable to justify their failure to have obtained a proper warrant before the seizure. See *Coolidge v. New Hampshire,* 403 U.S. 443, 464-472 (1971).

In the limited fact situations of Jones-type cases, in which the item seized would provide the basis of conviction, the Court should also recognize the Fourth Amendment's purpose as encompassing defendant's right to challenge both the search and seizure.[6] The Amendment was clearly intended to protect both property and some privacy interests against arbitrary and unreasonable infringement by the

[5]*United States v. Lisk,* 522 F.2d 228 (7th Cir. 1975) recognized the right to challenge the seizure of an item in which the defendant had a possessory claim.

[6]The facts in our case, even assuming the lack of standing to challenge the police presence on the premises, nonetheless encompassed both an actual search and seizure. The allegedly stolen mail seized by the police according to the description in the "return of officer serving search warrant" statement was contained in a cardboard box, paper bag or various white envelopes. The incriminating evidence, was thus apparently contained in unmarked containers. Since the stolen mail was not in plain view it was the search of the containers which led to the discovery of the stolen mail. A person should have a right of expectation that the police will not search a closed container, even containing contraband, unless in possession of an appropriate warrant. *United States v. Chadwick,* 433 U.S. 1 (1977). Thus, the search of the containers themselves should ultimately give the present defendant standing to challenge the search and seizure of the allegedly stolen mail.

federal government. In construing the Fourth Amendment it is essential to determine the scope of government intrusion in order to define the injury to the defendant. The ability to illegally search homes and illegally seize items with impunity is an end to which the Court must be very sensitive. Recognizing the right of a defendant in a Jones-type situation to challenge an illegal search where there is possessory interest in the items seized does not expand Fourth Amendment protections, but maintains the protections provided by Jones. An interest in the seizure should trigger an interest in the entire process of the seizure because of the great impact of allowing illegally acquired evidence which is the basis of a conviction. Deterrence of illegal police searches is all the more crucial in the context of seizure of essential evidence; a deterrent aim inextricably woven into the Fourth Amendment.

Upon recognition that a possessory interest in a seized item triggers protection under the Fourth Amendment, the only remaining issue is the methodology of establishing that possessory interest. An examination of the Jones-type indictment, the nature of the crime charged, the flexibility of F.R. 41(e) and the drawbacks to a defendant in testifying at a suppression hearing each contribute to the sound policy of granting automatic standing.

C. Since Implicit In The "Automatic Standing" Situation Is A Possessory Interest In The Item Seized, A Waiver Of A Suppression Hearing Is Permissible And Best Serves The Administration Of Justice.

An indictment charging possession creates the inference of possession for standing purposes. The Appeals Courts

have recognized that the possessory interests do not always need to be established by defendant's testimony, but may be established through other evidence including: inferences from indictments; statements in affidavits in support of the search warrant and testimony of witnesses at the suppression hearing. See *Spinnelli v. United States,* 382 F.2d 871, 879 (8th Cir. 1967); *United States v. Williams,* 536 F.2d 810, 813 (9th Cir. 1976). Indeed, an indictment itself constitutes prima facie evidence of probable cause of the elements charged. *Beavers v. Henkel,* 194 U.S. 73 (1903). Justice Frankfurter highlighted the inference warranted from the indictment itself when he wrote, "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure.' " *Jones v. United States, supra.* at 264.

The fair administration of justice is also a motivation for sustaining the automatic standing rule. *Jones v. United States, supra.* at 262-263. "It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the government." *Jones v. United States, supra.* at 263-264. The Court's reasoning was rooted in the conviction that there is Fourth Amendment standing upon establishing possession in seized goods at the time of the search and seizure. Upon this conception of the Fourth Amendment the only question which remained was the methodology in exercising one's Fourth Amendment rights. The Court in Jones determined that the procedure for asserting a violation of the Fourth Amendment was flexible.

Rule 41(e), the Court held, is a flexible procedural requirement designed to serve an important social policy. *Jones v. United States, supra* at . Consequently, the Court could waive the formality of a suppression hearing. A

suppression hearing would manifest but form over substance when the prosecutor's indictment inherently contains the grounds for a defendant's Fourth Amendment standing. The formality of a hearing is all the more troublesome due to the prosecution's gains by the requirement of a suppression hearing.

The Court in Jones was concerned with the dilemma of a defendant who was required to self-incriminate himself or herself in order to assert Fourth Amendment rights. The problem of self-incrimination was alleviated by the holding in *Simmons v. United States,* 390 U.S. 377, 389-394 (1968) that a prosecutor may not directly use against a defendant at trial any testimony given by the defendant at a pretrial hearing to establish standing to move to suppress evidence. See *Brown v. United States, supra* at 228. A suppression hearing, nonetheless, would force a defendant to provide the prosecutor with information which could be used indirectly against the defendant. An alert prosecutor may well elicit from defendants testifying at a suppression hearing small bits of information from which the prosecutor may well develop the basis for additional investigation calculated to make the State's case stronger. See *Duncan v. State,* 276 Md. 715, 351 A.2d 144 (1976). On the basis of evidence garnered at a suppression hearing, the prosecutor could corroborate or alter his or her anticipated trial strategy. A suppression hearing would also give the prosecution considerable power to develop a record of incriminating admissions which would make it impossible for the defendant to give any relevant testimony at trial. In sum, the protection afforded a Jones-type defendant by *Simmons, supra* is illusory.

The present defendant, charged with unlawful possession of stolen mail, in violation of 18 U.S.C. 1708, was indicted

for possession at the time of the search which is the basis for the motion to suppress. To require the defendant to testify at a suppression hearing would surely have a "chilling effect" on the exercise of Fourth Amendment rights due to the potential indirect losses that the defendant faces by testifying as to his possessory interests in the items or places directly tied to the indictment of possession.[7]

The Court is not confronted in this case with the question of whether to expand Fourth Amendment protections. The issue is whether to continue to respect the dilemma, be it indirect or direct, of a defendant charged with a possessory crime to have to testify and thus aid the prosecutor in order to keep out illegally seized evidence. Since harm would come to a defendant by eliminating the "automatic standing" rule the Court should refrain from redrawing the presently accepted criteria for standing. There is also prosecutorial contradiction in seeking to convict for possession and yet deny standing on a motion to suppress an essential element of the crime. The fair administration of justice warrants "automatic standing" when the possession interest is established through the indictment for possession.

---

[7]If the Court should determine that the "automatic standing" rule should be abolished, this case should be remanded for a hearing on the defendant's possessory rights in the premises searched and the items seized. *Combs v. United States, supra* and *Alderman v. United States, supra.* A remand is only appropriate because the defendant's possessory interests were not an issue in the Courts below because of the recognition of their automatic standing.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. SALVUCCI, JR. AND JOSEPH G. ZACKULAR

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT JOSEPH G. ZACKULAR

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT JOSEPH G. ZACKULAR

I.

THE FOURTH AMENDMENT RIGHTS OF THE RESPONDENTS WERE CLEARLY VIOLATED AND THE JUDGE WAS CORRECT IN RULING THAT THEY POSSESSED STANDING TO ASSERT A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Despite apparent assertions by the government in its brief it is still true that the Fourth Amendment protects people - and not simply areas - against unreasonable searches and

seizures. *Katz v. United States,* 389 U.S. 347 (1967); *Warden v. Hayden,* 387 U.S. 294 (1967); *United States v. Miller,* 425 U.S. 435 (1976). Although the respondent recognizes he possessed no actual standing to contest the lawfulness of the search and seizures in the instant case, the automatic standing rule, originally promulgated by the Court in *Jones v. United States,* 362 U.S. 257 (1960) clearly allowed him the right to assert an argument at a hearing on his motion to suppress that the government had abridged his rights. Contrary to what the government asserts in footnote 4 of its brief (Brief of the United States, p. 11) this Court should not just deny the motions to suppress and remand the case for trial if the Court agrees with the novel contentions advanced by the government. Because counsel relied on the basic premises of *Jones v. United States,* supra, that charging a defendant with a crime that necessitates proof of unlawful possession of the evidence in question confers automatic standing, this Court should remand the case for further evidentiary proceedings, if and only if the Court is prepared to overrule a case that lies at the very heart of the exclusionary rule. Dershowitz & Ely, *Harris v. New York: Some Anxious Observations On The Candor and Logic Of The Emergency Nixon Majority,* 80 Yale L.J. 1198, 1209-11 (1971).

The respondent also takes issue with a second assertion made by the government that this Court abandoned the concept of "standing" under the Fourth Amendment in *Rakas v. Illinois,* 439 U.S. 128 (1978). The respondent suggests that this interpretation of *Rakas* is clearly erroneous. The decision of the Court in *Rakas,* was limited to the facts before it. There the petitioners were not charged with a possessory crime and clearly did not have automatic standing to assert a violation of their constitutional rights.

Their status as passengers in a car owned and operated by another lent itself toward an inquiry "of whether this disputed search and seizure has infringed an interest of the Defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois,* supra at p. 140. This case presents an entirely different proposition. Although respondents in the instant case do not have actual standing the nature of charge confers automatic standing.

II.

"AUTOMATIC STANDING" RULE OF JONES V. UNITED STATES SHOULD NOT BE OVERRULED.

The government in the present case is asking the Court to reassess the validity of the "automatic standing" rule enunciated by this Court in *Jones v. United States,* 362 U.S. 257 (1960). This case is not an appropriate vehicle for that reassessment since the respondents were charged with crimes that have as an essential element proof of possession of the evidence seized at the time of the contested search and seizure. What Mr. Justice Frankfurter said in *Jones,* supra, rings true today:

> . . . To hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus

subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. *Jones v. United States,* 362 U.S. 257, 261.

The government's argument that Mr. Zackular is vicariously asserting the Fourth Amendment rights of his mother is completely without merit. *Alderman v. United States,* 394 U.S. 165 (1969). This argument would be true if Mr. Zackular was not charged with a crime that includes possession as an essential element. Indeed, the Court's opinion in *Rakas v. Illinois,* No. 77-5781 (December 5, 1978) supports this contention. Had the defendants in *Rakas* been charged with possessory crimes the respondent suggests the Court might have ruled differently.

The distinguishing feature of this case is the crime with which the defendant is charged. Zackular is charged with unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The very nature of this indictment provides him with "automatic standing" to assert a violation of his Fourth Amendment rights. *Jones v. United States,* supra. The opinions of the Court in *Brown v. United States,* 411 U.S. 223 (1973), and *Rakas v. Illinois,* supra, are not inapposite.

It is still true that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures. *Katz v. United States,* 389 U.S. 347 (1967); *Warden v. Hayden,* 387 U.S. 294 (1967); *United States v. Miller,* 425 U.S. 435 (1976). Mr. Zackular, in a very real sense, "a person aggrieved by an unlawful search and seizure". See Rule 41 (e) of the Federal Rules of Criminal Procedure. Rule 41 (e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms, while prosecuting for possession. The Court

in *Jones v. United States,* supra, was cognizant of the prosecutorial self-contradiction and ruled accordingly. The doctrine clearly must continue, otherwise every prosecutor would have an advantage in asserting that the defendant did not have possession to justify Fourth Amendment protection, but did have sufficient possession to justify a conviction.

The automatic standing role of Jones should clearly survive this Court's decision in *Simmons v. United States,* 390 U.S. 377 (1968). Simmons only resolved the self-incrimination dilemma faced by defendants who seek to suppress evidence and proffer testimony at a hearing on such a motion. To the extent *Simmons* permits a defendant's testimony on his suppression motion to be used to impeach his testimony at trial, the automatic standing rule should be retained. See 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §113, at 588-589-589 (1978).

The validity of the automatic standing rule rests also on the asserted "vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. "*Brown v. United States* 411 U.S. 223 (1973). After Simmons, courts have framed the question surrounding the Jones rule in terms of whether prosecutorial self-contradiction alone justifies maintenance of automatic standing. *Alderman v. United States,* 411 U.S. 223 (1973). This view of *Simmons* effect is myopic-the availability of pre-trial testimony for impeachment purposes still poses Fifth Amendment and prosecutorial self-contradiction problems

similar to those enuciated in Jones[1].

Although such incriminating testimony is admitted only for the jury's consideration of the defendant's credibility, from a practical standpoint, the testimony prejudices the defendant's case. Defendants who seek to exclude unlawfully seized evidence confront a choice: they may forego the exclusionary rule remedy to avoid self-incrimination when the suppression hearing testimony is admitted at trial for impeachment, or they may seek exclusion of unlawful evidence, establish standing, and forego testifying on their own behalf at trial. Moreover, under the guise of impeachment the prosecutor may then use the defendant's

[1]In Jones the Court decried the unfair position of a defendant charged with possession and forced to establish standing. 362 U.S. 257, 261-63 (1960);

The availability of pre-trial testimony for purposes of impeaching a defendant's credibility presents a dilemma for a defendant charged with possession that *Jones, Rakas* and *Simmons* do not assuage. Use of otherwise inadmissible pre-trial testimony for impeachment purposes was limited to situations where a defendant made sweeping denials of compliccity in the crimes charged. *Walder v. United States,* 347 U.S. 62, 65 (1953). Also, the prosecution could use otherwise-excluded evidence to impeach only those statements made by the defendant relating to matters collateral to the crimes charged. See *Harris v. New York,* 401 U.S. 222, 227-28 (Brennan, J., dissenting) (1971) *Walder* permits impeachment with unlawfully seized evidence only as to matters unrelated to indictment charges); *LaFave, supra* note 6, §11.6(a), at 700-11 (explaining Walder rule); 34 *Ohio* St. L.J. 706, 715 (1973) (use of unlawful evidence for impeachment originally depended on whether evidence collateral). In *Harris v. New York,* however, the Supreme Court broadened *Walder* by upholding the admission of statements made in violation of Miranda warnings, although they bore directly on the crimes charged when they were introduced to rebut a simple denial of criminal allegations. 401 U.S. 222, 226 (1971). Dismissing Walder as being no different "in principle," the Court ruled that "having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devises of the adversary process."

testimony to influence the jury's perception of the defendant's guilt.[2] This tactic is the moral equivalent of the prosecutorial advantage proscribed in *Jones.*

Liberal availability of otherwise inadmissible pre-trial testimony for impeachment purposes not only may taint the judicial process but also can undermine the deterrent objective of the exclusionary rule. Such ready circumvention of the exclusionary rule would encourage rather than prevent unlawful police procedures.[3]

Abrogation of the automatic standing rule would have an equally harmful effect. Police could deliberately conduct unlawful searches and seizures, knowing the violation of one person's rights may successfully implicate many unprotected persons.[4]

[2]In *Duncan v. State,* 276 Md. 715, 730, 351 A.2d 144, 152 (1976), the court observed that "(o)n a motion to suppress testimony an alert prosecutor might well elicit from persons in the position of (defendants) small bits of information from which he could well develop the basis for additional investigation calculated to make the State's case stronger. This represents one of the very vices *Jones* was intended to prevent." Thus, if a defendant charged with possession must testify at a suppression hearing, his incriminating, unfairly-elicited statements may later be deliberately introduced, under cover of impeachment, to effectively convict him.

[3]If the exclusionary rule is no obstacle to convicting defendants, police need not fear its sanctions when conducting searches or seizures. Police will have an incentive to violate Fourth Amendment rights where evidence cannot be obtained lawfully, if such evidence can be used in some way to obtain convictions. *See* Dershowitz & Ely, *supra* note 77 at 1219 n. 87 (deterrent effect of rule diminished wherever incentive for misconduct remains).

[4]Those charged with constructive possession or those implicated through violation of another's Fourth Amendment rights, do not have the requisite "legitimate" privacy interest and cannot challenge the unlawful search and seizure. Knowing this, police would only benefit by conducting an illegal search against one person if they expected to thereby implicate other persons. The exclusionary rule would no longer have its primary deterrence foundation.

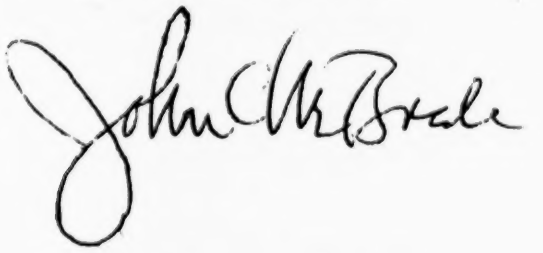
Judicial equity dictates maintenance of the automatic standing rule. The vices nourished by the rule's abrogation—unfair prosecutorial advantage, the self-incrimination dilemma, and police misconduct—outweigh the benefit of convicting or acquitting defendants on all reliable evidence. The Court of Appeals correctly allowed respondent's assertion of his Fourth Amendment rights where he was charged with possession.

The rationale of *Jones v. United States,* supra should control the decision of this Court. *Jones* made sense when it was decided twenty years ago and it makes sense today. The reasoning of the *Jones* Court was lucid and incisive. The reasoning of the government on the other hand is inconsistent with an even-handed administration of justice. This becomes quite clear when one examines the factual dilemma faced by the respondent, Zackular at the hearing on his motion to suppress and later, at a trial on the merits. To satisfy the government in this case Zackular, although charged with a possessory crime would have had to testify before the motion judge that he had a property interest in his mother's home or that the checks, in fact belonged to him. Having already made these admissions Zackular could not possibly have any desire to make the same inculpatory statements before a jury of his peers. Even if he did testify at a trial that the checks did not belong to him the prosecutor would be armed wth an arsenal of statements made at an earlier suppression hearing which would serve as admission of guilt at a trial. Any argument to the contrary is clearly erroneous.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,



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No. 79-244

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 79-244

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), enables a defendant to seek the suppression of evidence on Fourth Amendment grounds even though his own constitutional rights were not violated.[1] It thus serves to "allow a

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[1] The question presented in this case (Pet. 2; U.S. Br. 2) is "[w]hether a defendant *whose constitutional rights were not violated by an unlawful search* may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search" (emphasis added).

defendant to assert the Fourth Amendment rights of another." *Rakas* v. *Illinois*, 439 U.S. 128, 135 n.4 (1978). In this way, the "automatic standing" rule is at odds with the well-settled principle that " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' " *Rakas* v. *Illinois, supra*, 439 U.S. at 133-134, quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969).

In our opening brief we demonstrated that neither of the two rationales relied on in *Jones*—"the [defendant's] self-incrimination dilemma" and "the vice of prosecutorial self-contradiction" (*Brown* v. *United States*, 411 U.S. 223, 228, 229 (1973))—is adequate to sustain the continued validity of the "automatic standing" rule. This argument remains largely unanswered by respondents.[2]

Instead, respondent Salvucci offers a wholly different theory to support the "automatic standing"

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[2] Respondents do suggest (Salvucci Br. 13-14; Zackular Br. 5-8) that the self-incrimination dilemma persists despite *Simmons* v. *United States*, 390 U.S. 377 (1968), because of the possibility that the prosecutor could use a defendant's suppression-hearing testimony to impeach the defendant's testimony at trial, to gain leads to other evidence against the defendant, to prepare the government's trial strategy, or to learn of additional crimes with which to charge the defendant. These concerns, together with the further contention that in some jurisdictions the defendant's suppression-hearing testimony may be substantively admissible at trial as a prior inconsistent statement (see Fed. R. Evid. 801(d)(1)(A)), are also advanced in support of the "automatic standing" rule by petitioner in *Rawlings* v. *Kentucky*, cert. granted, No. 79-5146 (Dec. 10, 1979). See Pet. Br. 31-40. Of course, these issues regarding the limits of *Simmons* are not before the

rule. He first contends (Br. 5-11) that, at least in cases where possession at the time of the search is an essential element of the offense as charged, a de-

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Court in this case except insofar as they may bear on "automatic standing."

We have previously indicated (U.S. Br. 21-23 n.14) our view that *Simmons* does not preclude the use of a defendant's suppression-hearing testimony for impeachment purposes at trial. This position is in accord with the decisions of those courts that have considered the issue. See *Gray* v. *State*, 43 Md. App. 238, 403 A.2d 853 (1979); *People* v. *Douglas*, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); *State* v. *Buckley*, 171 Mont. 238, 557 P.2d 283 (1976); *People* v. *Sturgis*, 58 Ill. 2d 211, 317 N.E.2d 545 (1974); *State* v. *Petrovich*, 125 N.J. Super. 147, 309 A.2d 281 (1973); *State* v. *Vega*, 163 Conn. 304, 306 A.2d 855 (1972). See also *Bailey* v. *United States*, 389 F.2d 305, 311 (D.C. Cir. 1967), cited in *Simmons, supra*, 390 U.S. at 392 n.16, and *Woody* v. *United States*, 379 F.2d 130, 131-132 (D.C. Cir.) (Burger, J.), cert. denied, 389 U.S. 961 (1967). As discussed in our opening brief, however, this impeachment rule rests on the defendant's obligation to testify truthfully and limits only his ability to make contradictory statements at the two proceedings. Thus, it does not constitute the "dilemma" posed in *Jones* that a defendant's truthful testimony at the suppression hearing was tantamount to an admissible confession of guilt regardless of whether he took the stand at trial. To the extent that "such use create[s] an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior" (*McGautha* v. *California*, 402 U.S. 183, 211 (1971)), the appropriate course would be to expand the *Simmons* use-immunity, not to perpetuate the "automatic standing" rule.

For much the same reasons, the use of a defendant's prior inconsistent testimony as substantive rebuttal evidence at trial, even if permitted by *Simmons*, would not present the *Jones* self-incrimination dilemma. Rather than having the potential of inducing a truthful defendant to forgo a legiti-

fendant's possessory interest in the item *seized* is sufficient in and of itself to entitle the defendant to raise a Fourth Amendment challenge to the underlying *search*.[3] He then asserts (Br. 11-14) that the

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mate Fourth Amendment claim, this use of the defendant's statements would simply help to discourage fabricated defenses at trial. And once again, if the Court concludes that such use is impermissible, the better solution would be to extend the scope of *Simmons*, not to exclude reliable and probative evidence under the rule of "automatic standing."

Finally, the fear of a prosecutorial "fishing expedition" at the suppression hearing does not militate in favor of "automatic standing." This argument overlooks the responsibility of the prosecutor and the authority and duty of the presiding judicial officer to keep the hearing within proper bounds. But more importantly, it is completely unrelated to the "special problem" (362 U.S. at 261) regarding possessory offenses that concerned the Court in *Jones*. On the contrary, this argument is equally applicable to all suppression hearings and, if accepted, would lead to the conclusion that no defendant should be required to establish "standing." This Court, however, has repeatedly declined to broaden without limit the class of defendants that may move to suppress evidence, and as *Jones* itself noted (362 U.S. at 261), "[o]rdinarily * * * it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

[3] This argument also arises outside the context of "automatic standing" as an asserted basis for a defendant's "actual standing." Indeed, petitioner in *Rawlings* v. *Kentucky*, *supra*, makes precisely the same argument (Br. 46-58) to show his "actual standing" to contest the search in that case. See also *United States* v. *Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), petition for cert. pending *sub nom. United States* v. *Conway*, No. 79-393 (filed Sept. 7, 1979). Our response to this aspect of Salvucci's argument on "automatic standing" is fully applicable to these related arguments on "actual standing."

requisite possessory interest is necessarily established by the very charge of unlawful possession for which the defendant is being prosecuted, and therefore that the "automatic standing" rule is justified to avoid the needless formality of an inquiry into "standing" at the suppression hearing. In our view, however, neither the premise nor the conclusion of this position is sound.

I. BECAUSE A DEFENDANT'S POSSESSORY INTEREST IN CONTRABAND SEIZED DURING A SEARCH DOES NOT ENTITLE HIM TO SEEK SUPPRESSION OF THAT EVIDENCE ON THE GROUND THAT THE SEARCH VIOLATED THE FOURTH AMENDMENT, THE "AUTOMATIC STANDING" RULE CANNOT BE JUSTIFIED BY REFERENCE TO PRINCIPLES OF "ACTUAL STANDING"

A. A Proprietary Or Possessory Interest In Items Seized Does Not Entitle A Defendant To Challenge The Underlying Search

The Fourth Amendment protects against both unreasonable searches and unreasonable seizures. As is now well settled (see U.S. Br. 9-10), the touchstone of a search is a governmental intrusion upon a person's legitimate expectation of privacy. In contrast, the salient feature of a seizure of physical evidence is a governmental interference with the complex of property rights derived from a person's interest in or relation to a particular object. A search "depends not upon a property right in the invaded place" (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 143) but rather on an expectation of privacy "that society is prepared

to recognize as 'reasonable' " (*id.* at 144 n.12, quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); [4] a seizure, on the other hand, implicates precisely those property rights that a person has by virtue of his ownership or possession of the given object.[5]

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[4] While property interests remain relevant in assessing one's reasonable expectation of privacy (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12), even the owner of the premises or property searched is not entitled to seek the suppression of evidence if he had no privacy interest that was invaded. See, *e.g.*, *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914 (1st Cir. 1979), cert. denied, No. 79-5769 (Mar. 3, 1980); *United States* v. *Dyar*, 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978).

[5] At one time, the law of both searches and seizures was grounded in property concepts. For example, in cases of eavesdropping or electronic surveillance, the once-prevailing rule was that the Fourth Amendment did not apply unless there occurred a trespass or other infringement of the person's property right. See *Goldman* v. *United States*, 316 U.S. 129 (1942); *Olmstead* v. *United States*, 277 U.S. 438 (1928). This rule was repudiated in *Katz* v. *United States*, 389 U.S. 347, 353 (1967), on the basis "that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures" and that "[t]he Government's activities in electronically listening to and recording the [defendant's] words violated the privacy upon which he justifiably relied while using the telephone booth." Similarly, in *Jones* v. *United States*, *supra*, 362 U.S. at 266, the Court disapproved the "course of decisions by lower courts" that a person's "standing" to challenge a search depended upon his rights in the searched area under the common law of private property. See also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 142-143, 148-149 n.17.

With respect to seizures, "historically the right to search for and seize property depended upon the assertion by the

Salvucci's contention—that a defendant is entitled to challenge the validity of a search of a third-party's premises or property solely because he claims a possessory interest in an item seized during that search—ignores this fundamental distinction between a search and a seizure. While the defendant in those circumstances may litigate the legality of the seizure, he has no interest cognizable under the Fourth Amendment that allows him to contest the lawfulness of the search of another person's property or premises.[6]

Government of a valid claim of superior interest [in the property]." *Warden* v. *Hayden*, 387 U.S. 294, 303 (1967). This so-called "mere evidence" rule, which allowed governmental seizures of contraband or instrumentalities or fruits of crimes but not of items that were of only evidentiary value, was abandoned by the Court in *Hayden*. Thus, while a seizure is still defined with reference to a person's property interest in the seized object, it is no longer required that the government assert a superior interest in order to take possession.

[6] Respondents have not attacked the seizure of the stolen mail from the apartment rented by Zackular's mother, nor could they reasonably do so.

For the first time, Salvucci now argues (Br. 10 n.6) that the stolen mail was contained in a cardboard box, a paper bag, and a white envelope (see A. 15) and hence that the police officers' search of these containers gives respondents "actual standing" to controvert the validity of the warrant. We suggest that the Court should not consider this contention, since it was not raised in the courts below. See, *e.g.*, *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977) ("[a] respondent may make any argument *presented below* that supports the judgment of the lower court") (emphasis added); compare *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). In any event, Salvucci does not

These principles are clearly illustrated by *United States* v. *Lisk*, 522 F.2d 228 (7th Cir. 1977), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977). In *Lisk*, the defendant gave an explosive bomb to one Hunt for Hunt to keep in the trunk of his car until the defendant asked for its return; the defendant had no interest in Hunt's car but, according to a stipulation in the case, he retained a proprietary interest in the bomb. Approximately five days thereafter, the police officers searched the automobile and seized the bomb from the trunk. The government conceded that this search violated Hunt's Fourth Amendment rights, but it contended that the defendant did not have "standing" to move for suppression because his privacy was not invaded by the unlawful search of Hunt's car. The court of appeals agreed, rejecting the defendant's claim that his proprietary interest in the seized bomb established his "standing" to challenge the search. As then-Judge Stevens explained (522 F.2d at 230-231; footnotes omitted; emphasis in original):

> There is a difference between a search and a seizure. A search involves an invasion of privacy;

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claim that these receptacles were his or that he had a reasonable expectation of privacy with respect to them, and nothing in the record would lend credence to such a claim. Moreover, we doubt that containers like a paper bag or a cardboard box, particularly where used only to conceal the fruits of criminal activity, can generally support a reasonable expectation of privacy. See, *e.g.*, *United States* v. *Block*, 590 F.2d 535, 541 n.8 (4th Cir. 1978); *United States* v. *Neumann*, 585 F.2d 355, 360-361 (8th Cir. 1978); see also *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 9 n.9, 11-12 & n.13.

> a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence * * *. * * * Hunt's car was searched and defendant's property was seized. The invasion of Hunt's privacy was a violation of Hunt's Fourth Amendment rights, but this violation is clearly not available to the defendant as a basis for suppressing evidence acquired thereby. Defendant must rely on the seizure of the firearm as a violation of his own Fourth Amendment rights. * * * In sum, defendant has standing to object to the seizure, but no standing to object to the search. Having put the search to one side, he has not demonstrated that the evidence should be suppressed on the ground that *his* Fourth Amendment rights were violated by the seizure.[7]

Lisk represents the leading decision in this area and, in addition to the Seventh Circuit, the other courts of appeals to have considered the question have concluded with near uniformity that a defendant's

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[7] The court in *Lisk* recognized (522 F.2d at 230 & n.5) that, with respect to the defendant's proprietary interest in the seized bomb, the case was the same as if Hunt had consented to the search of the car or the bomb had been found in plain view. See also *United States* v. *Mazzelli*, *supra*, 595 F.2d at 1160 (Bonsal, J., dissenting) (defendant's Fourth Amendment rights based on items seized are no different than if a warrant had been obtained to search the third-party's premises or property); *United States* v. *Galante*, 547 F.2d 733, 739 n.11 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977). Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 369-370 (1968) (defendant's reasonable expectation of privacy in his office was not dispelled by the fact that others could have given consent to search but did not do so).

possessory interest in an item seized does not entitle him to object to the search of a third-party's premises or property in which he had no reasonable expectation of privacy. See *United States* v. *Galante*, 547 F.2d 733, 739 & n.11 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Lopez*, 420 F.2d 313, 316-317 (2d Cir. 1969) (Friendly, J.); *United States* v. *Crowell*, 586 F.2d 1020, 1026 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *United States* v. *Jackson*, 585 F.2d 653, 656-657 (4th Cir. 1978); *United States* v. *Evans*, 572 F.2d 455, 486 (5th Cir.), cert. denied, 439 U.S. 870 (1978); *United States* v. *Archbold-Newball*, 554 F.2d 665, 677-678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Smith*, 550 F.2d 277, 283 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Hunt*, 505 F.2d 931, 940-941 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States* v. *Hunter*, 550 F.2d 1066, 1074-1075 (6th Cir. 1977); *United States* v. *Wilson*, 536 F.2d 883, 885 (9th Cir.), cert. denied, 429 U.S. 982 (1976); but see *United States* v. *Mazzelli*, 595 F.2d 1157, 1159 & n.1, 1160 (9th Cir. 1979), petition for cert. pending *sub nom. United States* v. *Conway*, No. 79-393 (filed Sept. 7, 1979). See also *United States* v. *House*, 524 F.2d 1035, 1042 (3d Cir. 1975) (owner has "standing" to object to the seizure of his property from the temporary possession of a third party).[8] Commentators have also

[8] A similar analysis is reflected in "the present well-settled rule that a guest in a hotel or motel loses his reasonable expectation of privacy and consequently any standing to object to 'an unauthorized search of the premises' after his

reached a like conclusion. See, *e.g.*, Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1, 50 (1975) ("A possessory interest in the item seized should give rise to fourth amendment protection and should entitle an individual to challenge the reasonableness of the seizure. * * * A mere possessory interest in the item *seized* would not, however, confer standing to challenge the *search* which led to the discovery of that item.") (emphasis in original); 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3, at 563 (1978).[9]

rental period has terminated * * * even though he may have left property in the hotel room." *United States* v. *Jackson*, *supra*, 585 F.2d at 658. See, *e.g.*, *United States* v. *Akin*, 562 F.2d 459, 463-464 (7th Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Parizo*, 514 F.2d 52 (2d Cir. 1975); *United States* v. *Croft*, 429 F.2d 884 (10th Cir. 1970).

[9] Of course, if items are seized from an area in which the defendant has a legitimate expectation of privacy, such as his house, his person, or his luggage, he would be entitled to seek suppression on that basis regardless of any interest in the seized property. See *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 2-3, 8 n.8; *Alderman* v. *United States*, *supra*, 394 U.S. at 177 & n.10; *Mancusi* v. *DeForte*, 392 U.S. 364, 367 n.4 (1968). Moreover, a defendant may have a reasonable expectation of privacy in an area even though he does not hold title to that area or otherwise enjoy a common-law property interest. See *Mancusi* v. *DeForte*, *supra*; *Jones* v. *United States*, *supra*; *United States* v. *Jeffers*, 342 U.S. 48 (1951); see also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 & n.12. Thus, it is possible that one who temporarily entrusts his possessions to the custody of another, which possessions are then seized during an unlawful search of the custodian's premises, may be entitled to challenge the legality of the search as well as of the seizure. This would turn not on the

Notwithstanding the assertions of Salvucci (Br. 6-7) and of petitioner in *Rawlings* v. *Kentucky, supra* (Br. 46-49), the decisions of this Court do not compel a different result. In *Rakas* v. *Illinois, supra,* the Court acknowledged (439 U.S. at 142 & n.11) the possibility that a person who otherwise would not have a reasonable expectation of privacy in a given area might in fact have such an expectation if his own property were located and seized there. In our view, this portion of the opinion is merely an application of the more general principle, also recognized in *Rakas* (439 U.S. at 143-144 & n.12), that a person's

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owner's property interest in his belongings, however, but rather on any privacy interest in the searched area that he may have acquired incident to the transfer of his property. See Knox, *supra,* 40 Mo. L. Rev. at 50-52; 3 W. LaFave, *supra,* § 11.3, at 556-562; but see Gutterman, *"A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition,* 23 Emory L.J. 111, 118-120, 125-126 (1974). In our view, an analysis of that privacy interest would look to such factors as the relationship between the two parties; the existence of a common understanding regarding the nature of the particular item, the specific location in which it is to be kept, and the need for it to be securely or privately stored; and the authority of the bailee to use the item while it is in his custody. Respondents have never claimed that they had any expectation of privacy in the apartment of Zackular's mother, or even that they had her permission to store things there. Petitioner in *Rawlings* v. *Kentucky, supra,* does assert (Br. 57-62) that he had a reasonable expectation of privacy in Vanessa Cox's purse in which his narcotics were found. However, we doubt that such an expectation is demonstrated where, as in that case, the seized items consisted of contraband narcotics that the defendant had placed in his companion's purse, over her objection, only a few minutes before the police arrived (see Kentucky Br. 3, 26-27).

use of an area may be indicative of his expectation of privacy. See also 439 U.S. at 153 (Powell, J., concurring). Especially since the record did not establish that the defendants in *Rakas* owned the rifle and shells found by the police (see 439 U.S. at 129, 130-131 & n.1, 148), we do not read the Court's opinion to suggest in any way that a proprietary or possessory interest in the items seized would, without more, entitle a defendant to contest the underlying search. See also 439 U.S. at 164 n.14 (White, J., dissenting).[10]

Nor is *United States* v. *Jeffers,* 342 U.S. 48 (1951), to the contrary. The defendant in *Jeffers* was con-

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[10] The Court in *Rakas* also refused to remand for further factual proceedings on the question of ownership of the seized rifle and shells, since it found that the defendants had failed to assert their claim of ownership at the suppression hearing (439 U.S. at 130-131 n.1). We do not believe, however, that the Court's discussion in this regard can properly be taken to establish that such an interest, if timely raised and adequately demonstrated, would have sufficed to allow the defendants to challenge the search. Similarly, the issue raised here was not presented in *Brown* v. *United States, supra; Combs* v. *United States,* 408 U.S. 224 (1972); *Mancusi* v. *DeForte, supra;* or *Simmons* v. *United States, supra,* and we do not construe the Court's passing references on which Salvucci and Rawlings rely to signal a considered disposition of the matter. Finally, in *Jones* v. *United States, supra,* the Court, in accordance with the submissions of both parties (Pet. Br. 18, 32-38; U.S. Br. 13, 18-19, 24-25), appears to have assumed but not decided that a defendant would have "standing" to suppress if he alleged that he owned or possessed the seized property (362 U.S. at 261-263), an interest that the defendant in *Jones* did not assert (362 U.S. at 259). See also *United States* v. *Lisk, supra,* 522 F.2d at 233 n.5.

victed of violating the narcotics laws on the basis of drugs that were found during a warrantless search of a hotel room rented by his aunts. The search occurred while neither the defendant nor his aunts were present. The defendant had been given a key to the room and was permitted to use it at will, and he had in fact often entered the room for various purposes. In addition, the defendant claimed ownership of the narcotics that were seized. On that record, the Court held that the defendant had "standing" to contest the validity of the search. We do not read *Jeffers* to stand for the proposition that an interest in the property seized is, without more, a sufficient basis to seek the suppression of evidence. Rather, "[s]tanding in *Jeffers* was based on Jeffers' possessory interest in *both* the premises searched and the property seized." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 136 (emphasis added). While the Court has construed *Jeffers* to establish that "one with a possessory interest in [but not title to] the premises might have standing" (*Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368), it has "never cited *Jeffers* as adopting * * * [the] theory [that the defendant's interest in the seized property is itself sufficient to confer "standing" to challenge the search], and we are persuaded that it is not a correct reading of the *Jeffers* opinion itself." *United States* v. *Lisk*, *supra*, 522 F.2d at 233 (footnote omitted). The lower federal courts have read *Jeffers*, as we do, to rest on the theory "that the defendant's interest in the searched room rather than in the seized property allowed him to challenge the

search." *United States* v. *Lisk*, *supra*, 522 F.2d at 232 (footnote omitted). See also *United States* v. *Jackson*, *supra*, 585 F.2d at 657 n.5; *United States* v. *Lopez*, *supra*, 420 F.2d at 317. Thus, we do not believe that *Jeffers* should be interpreted to hold that a defendant's interest in seized property establishes his "standing" to contest the underlying search. In any event, as discussed above (pages 5-7, *supra*), more recent decisions of this Court cast substantial doubt on the continued validity of a rule that allows a defendant to challenge a search solely because of his interest in the items seized.

B. A Defendant's Possessory Interest In Contraband Is Totally Illegitimate And Does Not Give Rise To Any Rights Under The Fourth Amendment

Regardless of whether a defendant's interest in the item seized is generally sufficient to entitle him to contest the validity of the underlying search, we submit that an asserted possessory interest in contraband cannot serve as the basis of a Fourth Amendment claim. In our view, such an illicit interest is a wholly inadequate basis on which to rest a challenge to either a search or a seizure.[11]

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[11] Of course, if contraband is seized from a place in which the defendant has a legitimate expectation of privacy that exists independently of the placement of the contraband, then he may seek suppression on that basis despite the illegitimacy of his interest in the contraband itself. See, *e.g.*, *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 2-3, 8 n.8; *Warden* v. *Hayden*, *supra*, 387 U.S. at 305-306; *Jones* v. *United States*, *supra*; *United States* v. *Jeffers*, *supra*. See also note 9, *supra*.

This Court has emphasized that the Fourth Amendment's protection against unreasonable searches extends only to violations of *legitimate* expectations of privacy. See, *e.g.*, *Rakas* v. *Illinois*, *supra*, 439 U.S. at 141 n.9, 143-144 n.12; *Brown* v. *United States*, *supra*, 411 U.S. at 230 n.4; *Jones* v. *United States*, *supra*, 362 U.S. at 267; see also U.S. Br. 9-10. "[H]owever, a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. * * * [It must be] 'one that society is prepared to recognize as "reasonable."'" *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12, quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring). For this reason, as the Court noted in *Jones*, one whose interest is "wrongful * * * cannot invoke the privacy of the premises searched" (362 U.S. at 267). Thus, a person present in a stolen automobile at the time of a search has no legitimate expectation of privacy with respect to that automobile and therefore cannot object to the legality of the search. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 141 n.9. See also *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977) (no "standing" to challenge search of stolen suitcase).

Likewise, the Fourth Amendment does not recognize a legitimate possessory interest in contraband items that, by definition, a person may not lawfully possess, and one who is in wrongful possession cannot on that ground maintain a Fourth Amendment challenge to a search or a seizure involving such property. For example, an asserted interest in stolen goods is, as the

Court observed in *Brown* v. *United States*, "totally illegitimate" (411 U.S. at 230 n.4) and hence does not give rise to any rights under the Fourth Amendment. The courts of appeals have also held that a person has no legitimate interest in stolen property. See *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966) (Friendly, J.). See also Gutterman, *supra*, 23 Emory L. J. at 118-120; Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421, 438-444 (1975). The courts of appeals have similarly recognized that possession of contraband narcotics cannot support a legitimate Fourth Amendment interest. As the court observed in *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), "the possessors of such [contraband] articles have no legitimate expectation of privacy in substances which they have no right to possess at all. The narcotics peddler * * * has no privacy interest in the substance * * *." See also, *e.g.*, *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, No. 78-6592 (Oct. 1, 1979) ("courts have consistently held that * * * no one has [a legitimate privacy interest in contraband]"); *United States* v. *Botero*, 589 F.2d 430 (9th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *United States* v. *Washington*, 586 F.2d 1147,

1154 (7th Cir. 1978); *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976).[12] And we suggest that the same analysis is applicable to other forms of contraband, such as an unlawful firearm or a firearm unlawfully possessed by a previously convicted felon.

> Where the law absolutely forbids possession of a particular item, it is difficult to accept the proposition that a defendant has a fourth amendment interest in that item as opposed to, for example, the area in which it is located, *e.g.*, a house, apartment, office, or car. Surely, the only assumption that a thief or narcotics dealer can reasonably make is that law enforcement officials will seek to deprive him of possession of the contraband. Seizure can hardly be unanticipated. If the contraband is seized while hidden in an open field or in a confederate's home, neither the dealer nor the thief can claim a violation of his privacy. As Judge Friendly has rightly remarked, the values sought to be protected by the fourth amendment are not "served by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated to the latter's right to complain of a search and seizure * * *."

Trager & Lobenfeld, *supra*, 41 Brooklyn L. Rev. at 441, quoting *United States* v. *Bozza*, *supra*, 365 F.2d at 223.[13]

[12] We recognize that *United States* v. *Jeffers*, *supra*, can be read to allow a suppression claim to be based on the defendant's interest in the seized goods even though they are contraband. As discussed above (pages 13-15, *supra*), however, we think *Jeffers* is best understood in terms of the defendant's legitimate expectation of privacy in the hotel room that was searched, an expectation that is not lost simply because the defendant used the room in part as a storage area for his narcotics. Moreover, insofar as *Jeffers* rested on the defendant's interest in the drugs that were seized, we suggest that it is inconsistent with subsequent decisions of this Court and therefore can no longer be regarded as controlling.

[13] Respondents Salvucci (Br. 9) and Zackular (Br. 7 & n.4) argue that the effect of this argument and of the elimination of the "automatic standing" rule would be to encourage illegal police action and erode the deterrent function of the exclusionary rule. These assertions are unfounded. The "standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in the imposition of a criminal sanction on the victim of the search." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). As the Court explained in *Alderman* v. *United States*, *supra*, 394 U.S. at 174-175:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

See also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 137; *United States* v. *Ceccolini*, 435 U.S. 268, 275-276 (1978); *Stone* v. *Powell*, 428 U.S. 465, 488-489 (1976); *United States* v. *Janis*, 428 U.S. 433, 447 n.16 (1976); *United States* v. *Calandra*, *supra*, 414 U.S. at 350-351. Thus, with the single exception

In the instant case, the seized items consisted of stolen mail—items to which respondents had no rightful claim. Accordingly, irrespective of whether a lawful interest in seized property would suffice to permit a challenge to the antecedent search that uncovers the property, we submit that respondents' illicit interest in the stolen mail is inadequate to entitle them to seek suppression of that evidence.[14]

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of "automatic standing," the Court has consistently adhered to the principle that "only defendants whose Fourth Amendment rights have been violated [are permitted] to benefit from the [exclusionary] rule's protections." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 134 (footnote omitted). See *id.* at 134 n.3; *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 562-563 n.9 (1978); *United States* v. *Miller*, 425 U.S. 435, 444-445 (1976); *Brown* v. *United States*, *supra*, 411 U.S. at 230; *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172, 174. For the same reasons that the Court has previously declined to extend "standing" to those, including the target of the search (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 132-138; *id.* at 156 n.1 (White, J., dissenting)), whose Fourth Amendment rights were not violated, the deterrent objectives of the exclusionary rule do not require that the "automatic standing" doctrine be retained or that defendants be permitted to challenge the validity of a search solely on the basis of their possessory interest in the contraband seized. Rather, adequate deterrence results from allowing a defendant to seek suppression based on an unreasonable search only if his legitimate expectation of privacy was thereby infringed.

[14] We also note that the common-law actions of "[t]respass, replevin, and the other means of redress for persons aggrieved by searches and seizures" were not available with respect to contraband, which "at common law could be seized with impunity." *Warden* v. *Hayden*, *supra*, 387 U.S. at 303-304, 305-306. See also W. Prosser, *The Law of Torts* 78 n.62, 94 (4th ed. 1971) (a thief without colorable claim of right to property cannot recover in an action for trespass or conversion).

II. EVEN IF A DEFENDANT IS ENTITLED TO CHALLENGE A SEARCH SOLELY ON THE BASIS OF HIS POSSESSORY INTEREST IN THE CONTRABAND SEIZED, THE "AUTOMATIC STANDING" RULE SHOULD BE ABOLISHED BECAUSE IT ALLOWS EVIDENCE TO BE SUPPRESSED AT THE BEHEST OF DEFENDANTS WHOSE FOURTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

Respondent Salvucci argues (Br. 11-14) that, in the event he prevails on the foregoing issues, the "automatic standing" rule should be retained in order to promote the efficient administration of justice and eliminate unnecessary suppression hearings. Salvucci bases his argument on the proposition that the possessory offense with which a defendant is charged serves, without more, to establish the requisite possessory interest in the seized contraband to enable him to contest the underlying search. In essence, he contends that the charging of a possessory offense *ipso facto* constitutes an allegation by the government of the existence of facts that would afford "actual standing," and for that reason there is no point in abolishing the "automatic standing" rule.[15] However, as we now show, this argument is misconceived; even assuming that a possessory interest in the property seized will ordinarily give rise to Fourth Amend-

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[15] Since respondents have failed on the present record to adduce proof that they had a sufficient possessory interest in the stolen mail to confer "actual standing," they can succeed here in gaining affirmance of the court of appeals' judgment only if the Court accepts Salvucci's contention that the charging of a possessory offense necessarily demonstrates the defendant's possessory interest for Fourth Amendment purposes.

ment rights in the place that has been searched, there remains a significant category of cases in which the requisite Fourth Amendment interest would not exist, yet the defendant could still properly be charged with a "possessory" offense. Accordingly, the "automatic standing" doctrine should be overturned even if the Court concludes that there can be a Fourth Amendment interest in seized contraband that suffices by itself to enable the defendant to challenge the legality of a search.[16]

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[16] Salvucci's argument is essentially the same as the *Jones* "prosecutorial self-contradiction" argument that we discussed in our opening brief (U.S. Br. 23-28). For the reasons there stated, we submit that a defendant can fail to have the necessary possessory interest under the Fourth Amendment for "actual standing" but still be guilty of a possessory crime as a constructive possessor or an aider and abettor. See also *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (there exists "automatic standing" but not "actual standing" where defendant was charged with aiding and abetting the commission of a possessory offense). In addition, a defendant whose co-conspirators commit a possessory offense can be convicted of that offense under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), but nonetheless have no possessory right that is infringed by the unlawful search of his co-conspirators' premises or property. See *Alderman* v. *United States, supra*, 394 U.S. at 171-172 (defendant cannot assert Fourth Amendment rights of co-conspirator); *United States* v. *Hunt, supra*, 505 F.2d at 942 ("There is in fact nothing contradictory about the United States' argument in this case; a principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes."). Where a defendant does not have "actual standing," it is not contradictory for the government to charge him with a possessory offense and at the same time contend that he cannot challenge the search that produced the evidence against him.

We think it can scarcely be doubted that a defendant may commit a possessory offense and yet not have the kind of possessory interest required by even the most expansive Fourth Amendment standard. For instance, the head of a large narcotics operation may exercise dominion and control over the illegal drugs and thus be in constructive possession sufficient to violate the criminal code; at the same time, however, if he never holds the drugs or becomes involved in their storage and concealment, he is hardly in a position to raise a Fourth Amendment challenge to the search of the premises or property of one of his subordinates that uncovers the narcotics. Similarly, if this same defendant were held vicariously liable for the possessory offenses of his co-conspirators under the theory of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), he would still not have a Fourth Amendment right that would be infringed by the unlawful search of another's premises or property. Nor would his position under the Fourth Amendment be enhanced in any way if he were convicted and punished as a principal pursuant to 18 U.S.C. 2 for aiding and abetting the unlawful possession of contraband drugs. In all of these cases, the "automatic standing" rule would enable a defendant to seek the suppression of reliable and probative evidence even though the search he challenges did not even remotely affect *his* Fourth Amendment rights.

The fallacy of Salvucci's argument is clearly revealed by *United States* v. *Hunt*, 505 F.2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975). The

defendants in that case were charged with willfully, knowingly and unlawfully intercepting and endeavoring to intercept wire communications, in violation of 18 U.S.C. 2511(1)(a) and (2). Among the evidence introduced by the government were the tape recorders and recordings that were paid for by the defendants and seized from confederates acting under their direction. Finding that the "[d]efendants never saw any of the equipment, either during or after the operation" (505 F.2d at 940), the court of appeals held that the defendants' proprietary interest in the seized recorders and tapes did not confer standing on them to challenge the search (505 F.2d at 940-941):

> Whatever title defendants may possess in the disputed evidence, we cannot help but reflect that this discussion of master and servant law and legal title has taken us very far from the substance of Fourth Amendment rights. As we have indicated above, the constitutional right of protection against unreasonable searches and seizures attaches only when an individual's reasonable expectation of privacy is shattered by illegal Government intrusion. Whatever minimal possessory interest defendants may have in the seized equipment, we have been unable to discern the slightest privacy interest that defendants could reasonably assert in objects which they have never seen and of whose particular existence they were unaware until after the disputed search and seizure. If *Jones*, *Katz*, *Alderman* and *Brown* teach us anything, they indicate that common law notions about proprietary relations offer no *per se* rules in search and seizure cases; a naked

> assertion of possessory interest may be indicative but cannot be dispositive of the existence of a cognizable privacy interest in the place or thing searched.

In light of the court's analysis, we strongly doubt that the defendants in *Hunt* would have fared any better if they had been charged—under a theory of constructive possession, of *Pinkerton* liability, or of aiding and abetting—with a possessory offense such as knowing possession of an unlawful intercepting device, in violation of 18 U.S.C. 2512(1)(b). See also *United States* v. *Archbold-Newball*, 554 F.2d 665 (5th Cir.), cert. denied, 434 U.S. 1000 (1977) (based on *Hunt*, defendants claiming a proprietary interest in contraband seized during search of co-defendants' room had no standing to challenge the search).

As illustrated by these examples, we believe that the "automatic standing" rule sweeps too broadly to be a sound and acceptable principle. Thus, at the least, the Court should reject the "automatic standing" rule and require defendants to establish the requisite Fourth Amendment interest in accordance with the Court's disposition of the preceding issues.[17]

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[17] We recognize that in some situations the defendant's interest will be sufficiently evident that no formal hearing will be necessary. Where this is not the case, however, the defendant must demonstrate by adequate proof that his Fourth Amendment rights were violated. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 130-131 n.1. Contrary to the assertion (Br. 55-56) of petitioner in *Rawlings* v. *Kentucky*, *supra*, we see no reason to assume that suppression hearings would generally become more extensive than at present or "be expanded in

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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many instances into a miniature replica of the trial on the merits" under the position we advocate here. In the event the "automatic standing" rule is maintained, as Rawlings urges, a full suppression hearing would be required in every case involving a possessory offense in order to determine the lawfulness of the challenged search. It seems most unlikely that a significant incremental burden would be imposed if those hearings also included the issue whether the defendant is entitled to seek the suppression of evidence; to the extent that particular difficulties might arise in individual cases, the district court has authority to defer disposition of the suppression motion until after the trial and verdict (see Fed. R. Crim. P. 12(e)). Indeed, the position we advance might well serve to enhance judicial economy by eliminating the need for plenary hearings on the legality of police conduct in cases where the defendant currently comes within the "automatic standing" rule but it can be readily determined that, under our standard, he has no right to raise a Fourth Amendment claim.

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